Applicant Details

First Name	**Keagan Potts**
Middle Initial	**H**
Last Name	**Potts**
Citizenship Status	**U. S. Citizen**
Email Address	**Khpotts@umich.edu**
Address	**Address** Street **707 10th St NE** City **Washington** State/Territory **District of Columbia** Zip **20002-3733** Country **United States**
Contact Phone Number	**6128456786**

Applicant Education

BA/BS From	**Loyola University Chicago**
Date of BA/BS	**April 2016**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 1, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Whitman, Christina
cwhitman@umich.edu
734-764-9535

Caminker, Evan
caminker@umich.edu
734-764-5221

Eisenberg, Rebecca
rse@umich.edu
734-763-1372

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Keagan H. Potts
707 10th St NE, Washington, D.C. 20002
(612) 845-6786 • khpotts@umich.edu

The Honorable John D. Bates
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Room 4114
Washington, DC 20001

Dear Judge Bates, May 11, 2022

I graduated from the University of Michigan Law School in May 2021, and I am writing to apply for a clerkship position in your chambers for the 2024–2025 term. After graduation, I joined the commercial litigation practice group in Venable's Washington D.C. office. Later this year, during the 2022–2023 term, I will clerk for Judge Charles Lettow on the Court of Federal Claims.

Before law school, I completed a master's degree in philosophy with a specialization in ethics. I decided to pursue a career in law after discovering that academic philosophy would not provide sufficient opportunities to apply the concepts I was learning and analytic skills I was developing in service of meaningful change. I knew legal training would better facilitate the civic service I was missing from academia. Clerking for you would prepare me for a career as a civil servant.

Serving as your clerk would also afford me an opportunity to turn my long-standing interests in government litigation and administrative law into an area of specialization. Each of my publications explores the unique concerns arising from government action. For instance, in my *Michigan Law Review* note, I explored how the writ of habeas corpus can be implemented to balance justice, finality, and legitimacy. In my forthcoming note in the *Michigan Journal of Environmental and Administrative Law*, I examined how courts use judicial review of administrative action to ensure that agencies effectively distribute of essential services, protections, and opportunities. During my time in Michigan's Human Trafficking Clinic, I came to appreciate a legal advocate's ability to serve vulnerable clients both by protecting their interests in adjudicative and by proceedings providing them access to government agencies that provide vital resources.

As a new associate at Venable, I have nurtured these interests while working on cases that challenge government action or inaction, including a dispute arising from the assignment of ground leases on the government's land and a complaint alleging FEC Act violations.

My robust analytic research and writing abilities, time management skills, and attention to detail will make me an effective clerk. I have drawn on these skills in publishing four notes and articles in peer-reviewed journals. I will continue to hone these skills at Venable and as a Judicial Clerk later this year.

I have attached my resume, writing sample, and law school, graduate, and undergraduate transcripts for your review. Letters of recommendation from the following professors are attached as well:

- Professor Christina Whitman: cwhitman@umich.edu, (734) 764-9535
- Professor Rebecca Eisenberg: rse@umich.edu, (734) 763-1372
- Professor Evan Caminker: caminker@umich.edu, (734) 763-5221

Thank you for your time and consideration.

Respectfully,

Keagan Potts

Keagan H. Potts

707 10th St NE Washington, DC 20002
(612) 845-6786 • khpotts@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — May 2021
Journal: *Michigan Law Review,* Senior Editor, Selection Committee Member for issue on Critical Race Theory
Activities: Student Attorney, Human Trafficking Clinic; First-Year Information Leader; Communications Chair, National Lawyer's Guild; Head Graduate Student Instructor, Cognitive Science 200
Honors: Outstanding Scholarly Contribution Award (for Note in MICH. J. OF ENV'T & ADMIN. L.)

WESTERN MICHIGAN UNIVERSITY — Kalamazoo, MI
Master of Arts in Philosophy, *summa cum laude* — May 2018
Honors: Essay Prize in Ethics; Outstanding Graduate Researcher; Significant Educator; Research Assistant, Fullbright Specialist Program Project on Emerging Arctic Conflicts, Law, and Ethics
Activities: Instructor of Record, Just War Theory, Philosophy of Law, and Biomedical Ethics; Selection Committee, WMU Graduate Philosophy Conference; Founder, Ethics Outreach at WMU

LOYOLA UNIVERSITY, CHICAGO — Chicago, IL
Bachelor of Arts in Philosophy and English, *magna cum laude* — May 2016
Activities: Conference Champion and Pole Vault School Record Holder, DI Track and Field; Senior Thesis in Philosophy; Assistant Editor, *Stance: An International Undergraduate Philosophy Journal*

EXPERIENCE

U.S. COURT OF FEDERAL CLAIMS — Washington, D.C.
Law Clerk for the Honorable Charles Lettow — August 2022 – August 2023

VENABLE LLP — Washington, D.C.
Associate — October 2021 – Present
Summer Associate — June 2020 – July 2020

- Wrote sections of appellate brief in a commercial real estate dispute
- Prepared expert witness for deposition and assisted in preparing expert report
- Wrote opposition to motions for summary judgment and to exclude plaintiff's expert witness
- Wrote requests for document production, interrogatories, a motion to compel discovery, pretrial disclosures, and pretrial stipulations
- Composed demand letters for financial technology client seeking contract recision

THE JUSTICE COLLABORATIVE — Washington, D.C. (Remote)
Legal Intern — June 2019 – July 2019

- Created database analyzing the effectiveness of District Attorneys' policies on various issues

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS — El Paso, TX
Judicial Intern for the Honorable Frank Montalvo — May 2019 – June 2019

- Wrote a bench memorandum and drafted a preliminary injunction order in a case regarding trade secrets
- Assisted in revising the Fifth Circuit Pattern jury instructions
- Prepared a draft habeas order resolving petitioner's motion for a reformed sentence under state and federal law

PUBLICATIONS

- Keagan Potts, *A Solution to the Hard Problem of Soft Law*, 10 MICH. J. OF ENV'T & ADMIN L. (forthcoming, 2022)
- Keagan Potts, *Possible Reliance: Protecting Legally Innocent* Johnson *Claimants*, 119 MICH. L. REV. 425 (2020)
- Fritz Allhoff & Keagan Potts, *Medical Immunity, International Law and Just War Theory*, 165 J. OF THE ROYAL ARMY MED. CORPS 256 (2019)
- Keagan Potts, *Restricting Police Immunity*, 32 PUB. AFF. Q. 305 (2018)

VOLUNTEER

High School and Collegiate Ethics Bowl Coach; Michigan Immigrant Rights Center; Civil Rights Litigation Clearinghouse

BAR ADMISSIONS

District of Columbia—December 2021, Bar No. 1765272

Control No: E183761001 Issue Date: 05/31/2021 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Potts,Keagan
Student#: 03841344

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2018	**(September 04, 2018 To December 21, 2018)**							
LAW	510	004	Civil Procedure	Charles Silver	4.00	4.00	4.00	A-
LAW	520	002	Contracts	Bruce Frier	4.00	4.00	4.00	B
LAW	580	003	Torts	Chris Whitman	4.00	4.00	4.00	B+
LAW	593	010	Legal Practice Skills I	Timothy Pinto	2.00		2.00	S
LAW	598	010	Legal Pract:Writing & Analysis	Timothy Pinto	1.00		1.00	S
Term Total				**GPA: 3.333**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.333**		**12.00**	**15.00**	
Winter 2019	**(January 16, 2019 To May 09, 2019)**							
LAW	530	002	Criminal Law	Scott Hershovitz	4.00	4.00	4.00	B+
LAW	540	002	Introduction to Constitutional Law	Samuel Bagenstos	4.00	4.00	4.00	B
LAW	594	010	Legal Practice Skills II	Timothy Pinto	2.00		2.00	S
LAW	779	001	Prisons and the Law	Margo Schlanger	3.00	3.00	3.00	B+
Term Total				**GPA: 3.190**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.265**		**23.00**	**28.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Potts,Keagan
Student#: 03841344

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019			**(September 03, 2019 To December 20, 2019)**					
LAW	469	001	Reproductive Justice	Edward Goldman	2.00	2.00	2.00	A+
LAW	575	001	Natural Resources Law	Seth Barsky Andrew Mergen	2.00	2.00	2.00	B+
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00	4.00	4.00	B+
LAW	781	001	FDA Law	Rebecca Eisenberg	4.00	4.00	4.00	A
LAW	900	343	Research	Edward Goldman	1.00	1.00	1.00	A+
LAW	900	064	Research	Chris Whitman	2.00	2.00	2.00	A
Term Total				**GPA: 3.780**	**15.00**	**15.00**	**15.00**	
Cumulative Total				**GPA: 3.468**		**38.00**	**43.00**	
Winter 2020			**(January 15, 2020 To May 07, 2020)**					
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	669	001	Evidence	Richard Friedman	4.00		4.00	PS
LAW	727	001	Patent Law	Rebecca Eisenberg	4.00		4.00	PS
LAW	951	001	Human Trafficking Clinic	Elizabeth Campbell Danielle Kalil	4.00		4.00	PS
LAW	954	001	Human Trafficking Clinic Sem	Elizabeth Campbell Danielle Kalil	3.00		3.00	PS
Term Total					**15.00**		**15.00**	
Cumulative Total				**GPA: 3.468**		**38.00**	**58.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Potts,Keagan
Student#: 03841344

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020			**(August 31, 2020 To December 14, 2020)**					
LAW	569	002	Legislation and Regulation	Adam Pritchard	4.00	4.00	4.00	A-
LAW	634	001	Water Wars/Great Lakes	Andrew Buchsbaum	3.00	3.00	3.00	A-
LAW	674	001	Rules of Play Sports and Games as Legal Systems	Richard Friedman	2.00	2.00	2.00	A-
LAW	677	001	Federal Courts	Daniel Deacon	4.00	4.00	4.00	B+
LAW	894	001	Good Life/Government	Donald Regan	2.00	2.00	2.00	A
LAW	900	048	Research	Donald Regan	1.00	1.00	1.00	A
Term Total				**GPA: 3.656**	**16.00**	**16.00**	**16.00**	
Cumulative Total				**GPA: 3.524**		**54.00**	**74.00**	
Winter 2021			**(January 19, 2021 To May 06, 2021)**					
LAW	422	001	The Laws of Change	Christian Davenport	2.00	2.00	2.00	A
LAW	435	001	Law Firm Careers/Evolv Prof	Bob Hirshon	3.00	3.00	3.00	A
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A
LAW	900	105	Research	Evan Caminker	1.00	1.00	1.00	A
Term Total				**GPA: 3.930**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.602**		**67.00**	**87.00**	

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

Name: **Keagan Potts**
Student ID: **00001335313**
Birthdate :

Print Date: 1/24/18

Degrees Awarded

Degree: Bachelor of Arts
Conferral Date: 05/14/2016
Degree Honors: Honors
Degree Honors: Magna Cum Laude
Plan: Philosophy
Plan: English

Test Credits

Test Credits Applied Toward Undergraduate Arts & Sciences

	Earned
Transfer Totals:	6.000

Beginning of Undergraduate Record

Fall 2012

Program: Undergraduate Arts & Sciences

Course		Description	Attempted	Earned	Grade	Points
ANTH	100	Globalization&Local Cultures	3.000	3.000	B	9.000
ENGL	354	Contemp Critical Theory	3.000	3.000	A-	11.010
HONR	D101	Dev West Thght I Disc Honors	3.000	3.000	B+	9.990
HONR	101	Westrn Trad:Antiquty/Mid Ages Honors	3.000	3.000	B+	9.990
PHIL	130	Philosophy & Persons	3.000	3.000	A	12.000
UNIV	101	First Year Seminar	1.000	1.000	P	0.000
Term GPA		3.466 Term Totals	16.000	16.000		51.990
Cum GPA		3.466 Cum Totals	16.000	22.000		51.990

Name: **Keagan Potts**
Student ID: **00001335313**
Birthdate :

Print Date: 1/24/18

Spring 2013

Program: Undergraduate Arts & Sciences

Course		Description	Attempted	Earned	Grade	Points
HONR	D102	Dev West Thght II Disc Honors and Writing Intensive	3.000	3.000	A-	11.010
HONR	102	WestTrad:Renaissance/Modernity Honors	3.000	3.000	A-	11.010
Topic:		Renaissance to Modernity				
PHIL	181	Ethics	3.000	3.000	A-	11.010
THEO	295	Introduction to Islam	3.000	3.000	A	12.000
UCSF	137	Sci. Basis Env. Issues	3.000	3.000	A	12.000
Term GPA		3.802 Term Totals	15.000	15.000		57.030
Cum GPA		3.634 Cum Totals	31.000	37.000		109.020

Fall 2013

Program: Undergraduate Arts & Sciences

Course		Description	Attempted	Earned	Grade	Points
ENGL	274	Exploring Shakespeare Writing Intensive	3.000	3.000	A-	11.010
HIST	101	Evol Wst Idea/Inst to 17C	3.000	3.000	A	12.000
HONR	204E	Science and Society Honors	3.000	3.000	A	12.000
PHIL	274	Logic	3.000	3.000	A	12.000
PHIL	381	Philosophy of Science	3.000	3.000	A-	11.010
Term GPA		3.868 Term Totals	15.000	15.000		58.020
Cum GPA		3.712 Cum Totals	46.000	52.000		167.040

Spring 2014

Program: Undergraduate Arts & Sciences

Course		Description	Attempted	Earned	Grade	Points
ENGL	282C	Afr.-Amer. Lit Post-1900 Multicultural Class	3.000	3.000	A	12.000
ENGL	328	Studies in Renaissance	3.000	3.000	A-	11.010
HONR	203A	United States Experience Honors	3.000	3.000	A	12.000
PHIL	271	Philosophy of Religion	3.000	3.000	A	12.000
PHIL	309	Classical Modern Phil	3.000	3.000	B	9.000
Term GPA		3.734 Term Totals	15.000	15.000		56.010

Name: **Keagan Potts**
Student ID: **00001335313**
Birthdate :

Print Date: 1/24/18

Cum GPA	3.718 Cum Totals	61.000	67.000		223.050

Fall 2014

Program: Undergraduate Arts & Sciences

Course	Description	Attempted	Earned	Grade	Points
ENGL 326	Plays of Shakespeare	3.000	3.000	A	12.000
ENGL 395	Hon Tutr: Writing Intensive	3.000	3.000	A-	11.010
HONR 212C	Encountering the Middle East Honors	3.000	3.000	A-	11.010
PHIL 450 Topic:	Epistemology Priori, Know How, & Virtue	3.000	3.000	A-	11.010
SPAN 102	Spanish II	3.000	3.000	A	12.000
Term GPA	3.802 Term Totals	15.000	15.000		57.030
Cum GPA	3.734 Cum Totals	76.000	82.000		280.080

Spring 2015

Program: Undergraduate Arts & Sciences

Course	Description	Attempted	Earned	Grade	Points
ENGL 338	Stds in Romantic Period	3.000	3.000	A	12.000
ENGL 395	Hon Tutr: Writing Intensive	3.000	3.000	A	12.000
HONR 301A	Moral Responsibility (PHIL) Honors	3.000	3.000	A	12.000
PHIL 304	History of Ancient Phil	3.000	3.000	A	12.000
PHIL 311	Issues in Metaphysics	3.000	3.000	A	12.000
Term GPA	4.000 Term Totals	15.000	15.000		60.000
Cum GPA	3.779 Cum Totals	91.000	97.000		340.080

Fall 2015

Program: Undergraduate Arts & Sciences

Course	Description	Attempted	Earned	Grade	Points
ENGL 393	Tchg English to Adults Service Learning / Internship	3.000	3.000	A	12.000
ENGL 395	Hon Tutr: Writing Intensive	3.000	3.000	A	12.000
ENVS 224	Climate Change	3.000	3.000	A	12.000
HONR 208C	Latin America & The Caribbean Honors	3.000	3.000	A	12.000
PHIL 452 Topic:	Philosophy of Science Realism & Psych of Explanation	3.000	3.000	B+	9.990

Name: **Keagan Potts**
Student ID: **00001335313**
Birthdate :

Print Date: 1/24/18

Term GPA	3.866	Term Totals	15.000	15.000	57.990
Cum GPA	3.791	Cum Totals	106.000	112.000	398.070

Spring 2016

Program: Undergraduate Arts & Sciences

Course	Description	Attempted	Earned	Grade	Points
INDS 380	Newberry Seminar	6.000	6.000	A	24.000
Topic:	World of Atlantic Slavery				
PHIL 325	Case Based Reasoning	3.000	3.000	A	12.000
	Service Learning				
PHIL 398	Cap Sem in Contemp Phil	3.000	3.000	A	12.000
Topic:	The Grant Seminar				

Term GPA	4.000	Term Totals	12.000	12.000	48.000
Cum GPA	3.813	Cum Totals	118.000	124.000	446.070

Term Honor: Received Departmental Honors in Philosophy

Undergraduate Career Totals

Cum GPA:	3.813	Cum Totals	118.000	124.000	446.070

End of Loyola Unofficial Transcript

Keagan H. Potts
707 10th St. NE Washington, D.C. 20002
(612) 845-6786 • khpotts@umich.edu

I prepared this excerpt from a draft order denying the petitioner's request for habeas corpus relief during the Summer of 2019, when I was an intern for Judge Frank Montalvo, U.S. District Court for the Western District of Texas. Judge Montalvo gave me permission to use this as a writing sample. It is my own work.

ORDER DENYING PETITIONER'S MOTION PURSUANT TO 28 U.S.C. § 2255(F)(3)

Petitioner asks the court to reform his sentence.[1] He contends he should not have received an increased prison term under Section 1326(b)(2) ("Section 1326") as his prior Texas conviction for aggravated robbery does not constitute a crime of violence under 18 U.S.C. § 16 ("Section 16").[2] Based on the Motion, Response, Reply, and applicable law, the Motion is **DENIED**.

I. BACKGROUND

On September 24, 2013, Petitioner pleaded guilty to illegally reentering the United States in violation of Section 1326.[3] Petitioner had previously been convicted of aggravated robbery under Texas Penal Code § 29.03 in August 2004.[4] Consequently, this court sentenced him to seventy-one months under Section 1326(b)(2)—which provides a heightened maximum punishment of up to twenty years for aliens whose removal is "subsequent to a conviction for commission of an aggravated felony."[5] Aggravated felonies include crimes of violence as defined by Section 16.[6] The presentencing investigation report states that Petitioner's previous conviction qualifies as an aggravated felony, and that he is eligible for sentence enhancement pursuant to Section 1326(b)(2).[7]

Petitioner requests the court reform his sentence pursuant to 28 U.S.C. § 2255(f)(3) ("Section 2255").[8] He contends he should be sentenced under Section 1326(b)(1), rather than

[1] Reply 10; Mot. 5.

[2] Reply 1; Mot. 5.

[3] "Judgment in a Criminal Case," ECF No. 24, filed Dec. 12, 2013.

[4] "Judgment on Plea of Guilty Before the Court Waiver of Jury Trial," ECF No. 22-2, filed Nov. 25, 2013.

[5] 8 U.S.C. § 1326(b)(2).

[6] 8 U.S.C. § 1101(a)(43)(F).

[7] "Presentencing Investigation Report," ECF No. 22-5, filed Nov. 25, 2013.

[8] Reply 10.

Section 1326(b)(2).[9] Petitioner bases his claim for relief on the Supreme Court's holding in *Sessions v. Dimaya* that Section 16(b)'s definition of crime of violence was impermissibly vague in violation of the Constitution.[10] Petitioner argues his aggravated robbery conviction cannot provide a basis for enhanced sentencing. In opposition, Respondent contends Petitioner's claim is time-barred as *Dimaya* does not retroactively support habeas corpus claims brought under Section 2255.[11] Furthermore, Respondent explains that the Fifth Circuit has held Texas aggravated robbery qualifies as a crime of violence under Section 16(a).[12]

II. APPLICABLE LAW

Section 16 has two parts. Section 16(a) is known as the elements clause, which covers offenses that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." Section 16(b), the residual clause, encompasses any other crimes that by their nature, involve "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

III. DISCUSSION

A. Texas Robbery and Aggravated Robbery Constitute Crimes of Violence

The court begins with whether Texas robbery and aggravated robbery constitute crimes of violence under Section 16(a). If they do, Petitioner's enhanced sentence is valid. Depending on the statute defining the predicate offense, courts apply either the categorical or the modified categorical approach to determine whether it constitutes a crime of violence.[13]

---

[9] Section 1326(b)(1) allows for a maximum of ten years imprisonment for aliens "whose removal was subsequent to a conviction for commission of…a felony (other than aggravated felony)." 8 U.S.C. § 1326(b)(1).

[10] *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); Reply 1 n.4; Mot. 2–4.

[11] Resp. 4.

[12] *Id.* at 6; *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017).

[13] *See Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016).

Courts must determine whether a statute is divisible before deciding which approach to use.[14] Divisible statutes define multiple crimes by enunciating "different *elements* in the alternative."[15] Courts review divisible statutes under the modified categorical approach.[16] Under this approach, the court looks to "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of."[17] Courts then determine whether that crime, comprised of the particular elements the defendant satisfied, constitutes a crime of violence.[18]

Indivisible statutes, on the other hand, provide "various *factual* means of committing a single element."[19] Courts analyze indivisible statutes under the categorical approach.[20] With this approach, courts "ascribe to the defendant the least culpable conduct that could have given rise to his conviction" and determine whether such conduct qualifies as a crime of violence.[21] Petitioner argues the court should employ the categorical approach to determine whether Texas robbery and aggravated robbery are crimes of violence.[22]

---

[14] *See id.*; *See also United States v. Reyes-Contreras*, 910 F.3d 169,174 (5th Cir. 2018).

[15] *See United States v. Torres*, 923 F.3d 420, 424 (5th Cir. 2019) (citing *Mathis*, 136 S. Ct. at 2249) (emphasis added). For example, a burglary statute prohibiting the lawful or unlawful entry of a premises with the intent to steal, thereby "creat[ing] two different offenses, one more serious than the other," would be a divisible statute. *Mathis*, 136 S. Ct. at 2249.

[16] *See, e.g.*, *Shepard v. United States*, 544 U.S. 13, 16 (2005) (applying the modified categorical approach to the defendant's burglary conviction under a divisible statute).

[17] *Mathis*, 136 S. Ct. at 2249.

[18] *Id.*

[19] *Id.* (emphasis added). For instance, a statute requiring the "use of a 'deadly weapon' as an element of a crime" that further provides a "'knife, gun, bat, or similar weapon' would all qualify" as a deadly weapon constitutes an indivisible statute. *Id.* (citing *Descamps v. United States*, 570 U.S. 254 (2013), and *Richardson v. United States*, 526 U.S. 813 (1999)).

[20] *See Mathis*, 136 S. Ct. at 2248–49.

[21] *United States v. Torres*, 923 F.3d 420, 424 (5th Cir. 2019) (citing *Gomez-Perez v. Lynch*, 829 F.3d 323, 327–28 (5th Cir. 2016)).

[22] Reply 7–10.

If a crime constitutes a crime of violence under the categorical approach, it will also be a crime of violence under the modified categorical approach.[23] The categorical approach determines whether the least culpable conduct punishable under the statute grounding the predicate offense meets Section 16(a)'s requirements. It follows that any alternative means of committing the crime that could be isolated and analyzed under the modified categorical approach will also be a crime of violence. For this reason, the court assumes *arguendo* the categorical approach is appropriate. Accordingly, Petitioner may only prevail if he provides examples of Texas courts upholding robbery and aggravated robbery convictions in cases where the defendant's conduct falls outside the purview of Section 16(a).[24]

The Supreme Court held in *Voisine v. United States* that Section 16(a)'s mens rea requirement is fulfilled by reckless, knowing, or intentional conduct.[25] In *Stokeling v. United States*, the Court held that Section 16(a)'s force standard is met by force sufficient to overcome the victim's resistance.[26] Petitioner fails to demonstrate a realistic probability that Texas courts would apply Section 29.02 (robbery) or Section 29.03 (aggravated robbery) to conduct excluded by Section 16(a)'s definition of force as it has been interpreted by the Court in *Voisine* and *Stokeling*.

1. Texas Robbery Requires the Same Degree of Force as Section 16(a)

The court must consider whether Texas robbery requires the same degree of force as Section 16(a). Under Section 16(a), a crime of violence requires force "capable of causing physical pain or injury to another person."[27] In other words, Section 16(a) requires "a substantial

[23] *See United States v. Burris*, 920 F.3d 942, 948 (5th Cir. 2019).

[24] *See United States v. Garcia-Cantu*, 920 F.3d 252, 254 (5th Cir. 2019) (per curiam).

[25] 136 S. Ct. 2272 (2016).

[26] 139 S. Ct. 544 (2019).

[27] *Johnson v. United States*, 559 U.S. 133, 140 (2010).

degree of force" beyond mere offensive touching sufficient for misdemeanor battery[28] but is satisfied by something less than severe physical force.[29] Specifically, the Court held in *Stokeling* that Section 16(a)'s force requirement is met by a degree of force "sufficient to overcome the resistance of the victim, however slight."[30]

Robbery is a crime of violence at common law.[31] Texas follows the common law approach: robbery is satisfied by force capable of overcoming another's resistance to theft.[32] Consequently, Texas robbery and aggravated robbery constitute a crimes of violence under *Stokeling*.[33] Petitioner's conviction for aggravated robbery provides the predicate aggravated felony for enhanced sentencing under Section 1326(b)(2).

Petitioner interprets Section 16(a) to require more severe force than common law robbery.[34] As such, he contends Texas courts criminalize conduct that fails to meet Section 16(a)'s force requirement.[35] Indeed, Petitioner cites cases where Texas courts have upheld robbery convictions under the bodily injury provision when a defendant sent a tweet, causing the victim to have a seizure,[36] or when another caused the victim's injury by pulling a lottery ticket dispenser away from her.[37] Likewise, Texas courts have upheld robbery convictions under the

[28] *Id.* at 140–41.

[29] *Stokeling*, 139 S. Ct. at 552–53.

[30] *Id.* at 547.

[31] *Id.* at 551–52.

[32] 19 TEX. JUR. 3D CRIMINAL LAW § 230; *Aguilar v. State*, 263 S.W.3d 430, 433–34 (Tex. App. 2008); *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989).

[33] *See* Stokeling, 139 S. Ct. at 555.

[34] Reply 4.

[35] *Id.* at 4–6.

[36] *United States v. Burris*, 896 F.3d 320, 331 (5th Cir. 2018), *withdrawn*, 908 F.3d 152 (5th Cir. 2018), *rev'd on reh'g*, 920 F.3d 942 (5th Cir. 2019).

[37] *Matlock v. State*, 20 S.W.3d 57, 61 (Tex. App. 2000).

threat provision based on a defendant's "menacing look and clenched fists"[38] or because another "giggled really funny" and fled the store with stolen merchandise.[39] According to Petitioner, the force applied in these cases falls short of the violent force required by Section 16(a).[40] If Section 16(a) demanded a higher degree of force than is sufficient for Texas robbery, Texas robbery would not be an aggravated felony under Section 1326(b)(2).

However, Section 16(a) does not require a greater degree of force than Texas robbery. The Fifth Circuit—applying the categorical approach—recently held in *Burris* that Texas robbery constitutes a crime of violence as defined by the Section 16(a).[41] The minimum degree of exerted or threatened force sufficient to satisfy Texas robbery also fulfills Section 16(a)'s force requirement.[42]

Petitioner's argument is based on a misunderstanding of *Johnson v. United States*.[43] He argues *Johnson*'s holding—that the force entailed in misdemeanor battery does not qualify as force under Section 16(a)—entails that Section 16(a) adopts a higher threshold of force than common law robbery.[44] However, in *Stokeling* the Court clarified its prior holding in *Johnson*: Section 16(a)'s force requirement is met by the same amount of force as common-law robbery.[45] The Court reasoned that if Section 16(a) required force to be '"severe,' 'extreme,' 'furious, 'or 'vehement'" its threshold would be too high, as it would exclude many crimes Congress intended to identify as "crimes of violence."[46]

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[38] *Wilmeth v. State*, 808 S.W.2d 703, 706 (Tex. App. 1991).

[39] *Williams v. State*, 827 S.W.2d 614, 615–17 (Tex. App. 1992).

[40] Reply 6.

[41] *United States v. Burris*, 920 F.3d 942, 946 (5th Cir. 2019).

[42] *Id.* at 958.

[43] *Johnson v. United States*, 559 U.S. 133 (2010).

[44] Reply 3–4.

[45] *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019).

[46] *Id.* at 553.

Accordingly, Petitioner's interpretation would flout Congress's intent by making Section 16(a) and Section 1326(b)(2) inapplicable to criminals convicted under many states 'robbery statutes.[47] Two years after Congress first passed the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), it expanded the number of offenses that qualify as crimes of violence by "replac[ing] the two enumerated crimes of 'robbery or burglary 'with the current elements clause."[48] The ACCA's elements clause is repeated *verbatim* in Section 16(a).[49] In the revised statute, "Congress made clear that 'force 'retained the same common-law definition that undergirded the original definition of robbery."[50]

This court's conclusion that Texas robbery constitutes a crime of violence is also consistent with *Johnson*'s holding that the minimal contact sufficient to support a misdemeanor battery conviction falls outside of Section 16(a)'s coverage.[51] Such force is different from force suffered by robbery victims—including the victims in *Wilmeth v. State*,[52] *Williams v. State*,[53] and *Matlock v. State*[54]—as battery does not require physical resistance from the victim.[55] "By contrast, the force necessary to overcome a victim's physical resistance is inherently 'violent 'in the sense contemplated by *Johnson*."[56] Indeed, the Fifth Circuit pointed out in *Burris* that the

[47] *See id.* at 552.

[48] *See id.* at 551.

[49] *Compare* 18 U.S.C. § 924(e)(2)(B)(i) *with* 18 U.S.C. § 16(a).

[50] *Stokeling*, 139 S. Ct. at 551.

[51] *Johnson v. United States*, 559 U.S. 133, 141–42 (2010).

[52] 808 S.W.2d 703, 706 (Tex. App. 1991).

[53] 827 S.W.2d 614, 615–17 (Tex. App. 1992).

[54] 20 S.W.3d 57, 61 (Tex. App. 2000).

[55] *Stokeling*, 139 S. Ct. at 553.

[56] *Id.* "The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury.'" *Id.* (quoting *Johnson*, 559 U.S. at 140).

amount of force need not be substantial: even "pull[ing] a diamond pin out of a woman's hair when doing so tore away hair attached to the pin" constituted sufficient force to sustain a robbery conviction.[57] As such, it is inconsequential that the force used is minimal.

Consequently, Petitioner fails to show a realistic probability that Texas courts will uphold a robbery conviction when the defendant applies force that is not grave enough to meet Section 16(a)'s requirement. Although Petitioner highlights cases where victims suffered seemingly minor injuries and vague threats, the definition of force adopted by Section 29.02 and Section 16(a) is inherently relational to the victim's resistance.[58] If the threatened or applied force overcomes the victim's resistance, "however slight that resistance might be, it necessarily constitute[s] violence."[59] Therefore, Texas robbery requires the same degree of force as Section 16(a) and qualifies as a crime of violence.

2. Texas Robbery and Section 16(a) Both Criminalize Recklessness

The court now turns to whether Texas robbery and Section 16(a) require the same mens rea. Texas robbery includes "recklessly caus[ing] bodily injury to another."[60] Petitioner maintains Section 16(a) does not apply to reckless conduct.[61] However, the Supreme Court's holding in *Voisine v. United States*[62] demonstrates that Section 16(a)'s force requirement can be met by reckless, knowing, or intentional conduct.[63] In *Voisine*, the Court held "[a] person who

[57] *United States v. Burris*, 920 F.3d 942, 958 (5th Cir. 2019) (quoting *Stokeling*, 139 S. Ct. at 550).

[58] *See* 19 TEX. JUR. 3D CRIMINAL LAW § 230.

[59] *Stokeling*, 139 S. Ct. at 550 (citation omitted).

[60] TEX. PENAL CODE § 29.02(a)(1).

[61] Reply 5.

[62] 136 S. Ct. 2272 (2016) (interpreting the meaning of 'use' in the definition of Misdemeanor Crimes of Domestic Violence as those that have "the use or attempted use of physical force" as an element).

[63] *Id.* at 2282; *Accord United States v. Burris*, 920 F.3d 942, 951 (5th Cir. 2019) (citing *Voisine*, 136 S. Ct. at 2279; *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)).

assaults another recklessly 'uses 'force, no less than one who carries out that same action knowingly or intentionally."[64] Although *Voisine* concerned the definition of misdemeanor crimes of domestic violence,[65] the Court's holding applies to other contexts. For instance, the Fifth Circuit held in *United States v. Burris* that the ACCA's definition of crime of violence [66] is satisfied by reckless use of force.[67] Likewise, the Fifth Circuit held in *United States v. Reyes-Contreras* that reckless conduct also warrants enhanced sentencing under Section 1326(b)(2).[68] Accordingly, Texas robbery is a crime of violence under Section 16(a). Petitioner's claim that a defendant must knowingly or intentionally cause bodily injury to satisfy Section 16(a)'s force requirement contradicts both Fifth Circuit and Supreme Court precedent.[69]

3. Texas Aggravated Robbery is Satisfied by Reckless Uses of Force Capable of Overcoming the Victim's Resistance

Having established Texas robbery constitutes a crime of violence, the court determines whether Texas aggravated robbery does as well. Defendants who recklessly, knowingly, or intentionally threaten or apply force sufficient to overcome the victim's resistance commit crimes of violence.[70] A person is guilty of aggravated robbery under Texas Penal Code § 29.03 ("Section 29.03") if, during the course of a robbery, he (1) causes serious bodily injury, (2) uses or exhibits a deadly weapon, or (3) robs a person who is either disabled or 65 years of age or older.[71] All three elements of Texas aggravated robbery meet Section 16(a)'s force requirement.

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[64] *Voisine*, 136 S. Ct. at 2280.

[65] 18 U.S.C. § 921(a)(33)(A). The relevant part of the statute states "'misdemeanor crime of domestic violence' means an offense that…has, as an element, the use or attempted use of physical force." *Id*.

[66] *Id.* § 924(e)(2)(B)(i). The language of ACCA's force clause is identical to Section 16(a).

[67] *Burris*, 920 F.3d at 942.

[68] 910 F.3d 169, 183 (5th Cir. 2018).

[69] Reply 5.

[70] *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Voisine v. United States*, 136 S. Ct. 2272 (2016)

[71] TEX. PENAL CODE § 29.03.

This court need not determine which of the factors encompass the "least culpable conduct that could have given rise to [Petitioner's] conviction"[72] to hold aggravated robbery is a crime of violence. Consequently, it qualifies as an aggravated felony capable of supporting an enhanced sentence under Section 1326(b)(2).

B. The Timeliness of Petitioner's Claim is Moot

Petitioner and Respondent dispute whether Petitioner's habeas claim is timely.[73] As Petitioner's claim on the merits fails, the court declines to address whether *Dimaya* extended the filing deadline for habeas claims under Section 2255(f)(3).

IV. CONCLUSION

Petitioner has failed to show by a preponderance of the evidence that Texas robbery and aggravated robbery do not constitute crimes of violence. Section 16(a)'s use of force requirement is satisfied by defendants who recklessly, knowingly, or intentionally threaten or apply force capable of overcoming the victim's resistance.[74] Under Texas law, neither robbery nor aggravated robbery criminalizes conduct that falls outside of Section 16(a)'s definition of force. Thus, both crimes constitute crimes of violence and either can serve as the predicate aggravated felony conviction for a sentence enhancement under Section 1326(b)(2). The court did not err in its enhanced sentence of Petitioner under Section 1326(b)(2).

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[72] *United States v. Torres*, 923 F.3d 420, 424 (5th Cir. 2019) (citing *Gomez-Perez v. Lynch*, 829 F.3d 323, 327–28 (5th Cir. 2016)).

[73] Resp. 4–5; Reply 1 n.4; Mot. 2–4.

[74] *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Voisine v. United States*, 136 S. Ct. 2272 (2016); *Johnson v. United States*, 559 U.S. 133 (2010); *United States v. Burris*, 920 F.3d 942, 953 (5th Cir. 2019); *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018).

Applicant Details

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Contact Phone Number	**478-320-3684**

Applicant Education

BA/BS From	**University of Georgia**
Date of BA/BS	**May 2008**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 8, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Oral Advocacy Competition** **Campbell Moot Court Competition - Competitor & Board Member**

Bar Admission

Admission(s) **California**

Prior Judicial Experience

Judicial Internships/ Externships **No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

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References

Hon. Patrick J. Schiltz, PJSchiltz@mnd.uscourts.gov, (612) 664-5480

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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April 1, 2022

The Honorable John D. Bates
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am currently a law clerk for Judge Patrick J. Schiltz of the U.S. District Court for the District of Minnesota. I am applying for the Rules Clerk position in your chambers for the 2022–2023 term.

I previously clerked for Judge Danny J. Boggs of the U.S. Court of Appeals for the Sixth Circuit. I am a 2020 graduate of the University of Michigan Law School, where I served as an editor of the *Michigan Law Review* and graduated in approximately the top 3% of my class.

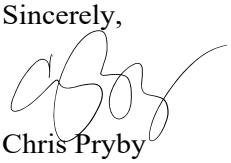
I believe that my interests make me a good fit for this position. I have a strong interest in procedure, both academically and from a policy perspective. As an academic, I am interested in studying the tradeoffs that society makes between procedural and substantive rights—in particular, quantitatively modeling how changes in procedure affect different populations. Also, I eventually would like to enter federal appellate practice, and I want to be involved in the development of procedural rules promoting good policy, whether for state or the federal courts. Serving as your Rules Clerk would prepare me to participate in that process as an informed commentator or policymaker.

Please find enclosed my résumé, my academic transcripts, and a writing sample for your review. Letters from the following recommenders will arrive under separate cover. Additionally, Judge Schiltz has offered to be a reference for my application.

- Judge Boggs: Danny_J_Boggs@ca6.uscourts.gov, (502) 625-3900
- Professor Barbara McQuade: bmcquade@umich.edu, (734) 763-3813
- Professor Melissa Salinas: salinasm@umich.edu, (734) 763-4319

Thank you for your time and consideration.

Sincerely,



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EDUCATION

University of Michigan Law School, Juris Doctor, *magna cum laude*, ranked #6 out of 331 — May 2020
Honors: Order of the Coif
Certificate of Merit (highest grade) in Taxation of Individual Income & Corporate Criminality
Journal: *Michigan Law Review*, Senior Editor
Publication: *Forensic Border Searches After* Carpenter, 118 MICH. L. REV. 507 (2019)
Activities: Campbell Moot Court Competition (Rules Chair, 2018–2019; Participant, 2019)

Georgia Institute of Technology, Doctor of Philosophy in Mathematics — Dec. 2014
Publication: *Sets of Rich Lines in General Position*, 96 J. LONDON MATHEMATICAL SOC'Y 67 (2017)
Honors: President's Fellowship (full tuition & stipend); Outstanding Teaching Assistant

University of Georgia, Bachelor of Science in Mathematics & Computer Science, *summa cum laude* — May 2009
Honors: Phi Beta Kappa
Minor: Theater

EXPERIENCE

Hon. Patrick J. Schiltz, United States District Court for the District of Minnesota — Minneapolis, Minn.
Law Clerk — Aug. 2021–present

Hon. Danny J. Boggs, **United States Court of Appeals for the Sixth Circuit** — Louisville, Ky.
Law Clerk — Aug. 2020–Aug. 2021

Federal Appellate Litigation Clinic, University of Michigan Law School — Ann Arbor, Mich.
Student Attorney — Sept. 2019–Aug. 2020
- Represented federal inmate challenging criminal forfeiture under 21 U.S.C. § 853(p) on appeal to Sixth Circuit
- Interviewed family and sought medical records to build case for compassionate release during COVID pandemic

San Francisco District Attorney's Office — San Francisco, Cal.
Summer Law Clerk — May–Aug. 2019
- Appeared for the People in 3 preliminary examinations, including examining and cross-examining witnesses
- Researched and drafted motions and oppositions to criminal motions
- Trained in tactics for conducting jury trials, including voir dire, opening statements, and closing arguments

Office of the United States Attorney for the Eastern District of Michigan — Detroit, Mich.
Law Student Volunteer — May–Aug. 2018
- Wrote internal legal memoranda analyzing issues for civil and criminal cases; drafted sentencing memoranda
- Appeared before magistrate judge; negotiated plea with defendant who illegally parked at VA hospital

Georgia Institute of Technology — Atlanta, Ga. & Paris, France
Lecturer — May 2015–Aug. 2017
- Delivered online instruction for the Georgia Tech Online Master of Science in Computer Science program
- Managed teams of up to 9 teaching assistants to respond to student questions and grade assignments and exams
- Investigated academic dishonesty and reported findings; tried plagiarism case before academic integrity panel

Udacity — Atlanta, Ga. & Paris, France
Course Developer — Dec. 2014–Dec. 2016
- Created materials for courses in the Georgia Tech Online Master of Science in Computer Science program

National Security Agency — Fort Meade, Md.
Participant, Director's Summer Program — May–Aug. 2008, May–Aug. 2009
- Analyzed encrypted communications using mathematical and statistical techniques
- Held TS/SCI security clearance

ADDITIONAL

Bar Admissions: California (active since Jan. 2021)
Achievements: Second-degree black belt in hapkido; Eagle Scout
Languages: French (1 year self-study in Paris), German (2 years study); Korean (1 year study)
Interests: Reading my way through history, comparative linguistics & mythology, programming, fine dining

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Pryby,Christopher Ian
Student#: 76467462

Degree Conferred: JD
Date Conferred: May 07, 2020
Honors: Magna Cum Laude

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2017	**(September 05, 2017 To December 22, 2017)**							
LAW	510	001	Civil Procedure	Len Niehoff	4.00	4.00	4.00	B+
LAW	520	002	Contracts	Nicolas Cornell	4.00	4.00	4.00	A
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	A-
LAW	593	002	Legal Practice Skills I	Matthew Fogarty	2.00		2.00	H
LAW	598	002	Legal Pract:Writing & Analysis	Matthew Fogarty	1.00		1.00	H
Term Total				**GPA: 3.666**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.666**		**12.00**	**15.00**	
Winter 2018	**(January 10, 2018 To May 03, 2018)**							
LAW	530	001	Criminal Law	Sonja Starr	4.00	4.00	4.00	A-
LAW	536	001	Nat'l Security & Civ Liberties	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	540	001	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	A
LAW	594	002	Legal Practice Skills II	Timothy Pinto	2.00		2.00	H
LAW	703	001	Legal Issues/Autonomous Veh	Emily Frascaroli	2.00	2.00	2.00	A
Term Total				**GPA: 3.838**	**15.00**	**13.00**	**15.00**	
Cumulative Total				**GPA: 3.756**		**25.00**	**30.00**	

Continued next page >

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Pryby,Christopher Ian
Student#: 76467462

Degree Conferred: JD
Date Conferred: May 07, 2020
Honors: Magna Cum Laude

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2018	**(September 04, 2018 To December 21, 2018)**							
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	A-
LAW	669	001	Evidence	Richard Friedman	4.00	4.00	4.00	A
LAW	733	001	Editing & Advocacy: Litigation	Patrick Barry	1.00		1.00	S
LAW	834	001	Problems in Const'l Theory	Richard Primus	2.00	2.00	2.00	A-
LAW	875	001	Privacy, Tech & 4th Amendment	Evan Caminker	2.00	2.00	2.00	A+
LAW	900	138	Research	Richard Primus	1.00	1.00	1.00	A-
LAW	900	133	Research	Barbara Mcquade	2.00	2.00	2.00	A
Term Total				**GPA: 3.900**	**16.00**	**15.00**	**16.00**	
Cumulative Total				**GPA: 3.810**		**40.00**	**46.00**	
Winter 2019	**(January 16, 2019 To May 09, 2019)**							
LAW	569	001	Legislation and Regulation	Nina Mendelson	4.00	4.00	4.00	A
LAW	608	001	Advanced Legal Research	Kincaid Brown Virginia Neisler	2.00	2.00	2.00	A
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	747	001	Taxation of Individual Income	Kyle Logue	4.00	4.00	4.00	A+
LAW	983	001	Moot Court Board	Joan Larsen	3.00		3.00	S
Term Total				**GPA: 4.023**	**16.00**	**13.00**	**16.00**	
Cumulative Total				**GPA: 3.862**		**53.00**	**62.00**	

Continued next page >

Control No: E188872002 Issue Date: 04/05/2022 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Pryby,Christopher Ian
Student#: 76467462

Degree Conferred: JD
Date Conferred: May 07, 2020
Honors: Magna Cum Laude

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	527	001	Corporate Criminality	Daniel Hurley	3.00	3.00	3.00	A+
LAW	677	001	Federal Courts	Leah Litman	4.00		4.00	P
LAW	694	001	International Litigation	Mathias Reimann	3.00		3.00	P
LAW	972	001	Federal Appel Litig Clnc I	Melissa Salinas	5.00	5.00	5.00	A+
Term Total				**GPA: 4.300**	**15.00**	**8.00**	**15.00**	
Cumulative Total				**GPA: 3.919**		**61.00**	**77.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	586	001	Conflict of Laws	Norman Ankers	3.00		3.00	PS
LAW	727	001	Patent Law	Rebecca Eisenberg	4.00		4.00	PS
LAW	788	001	Habeas Corpus	Eve Primus	2.00		2.00	PS
LAW	878	001	State Supreme Court Practice	Bridget McCormack	2.00		2.00	PS
LAW	900	099	Research	Bridget McCormack	1.00		1.00	PS
LAW	980	334	Advanced Clinical Law	Melissa Salinas	3.00		3.00	PS
Term Total					**15.00**		**15.00**	
Cumulative Total				**GPA: 3.919**		**61.00**	**92.00**	

End of Transcript
Total Number of Pages 3

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

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ATHENS, GEORGIA 30602-6113

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JAN HATHCOTE
REGISTRAR

MONTH AND DAY OF BIRTH	STUDENT NAME
DECEMBER 22	PRYBY, CHRISTOPHER IAN

DATE PRINTED	PAGE NO.	TRANSCRIPT CONTROL NUMBER
08/24/2016	1 OF 2	DOCUMENTID: 10924572

DEGREE OBJ.	COLLEGE OR SCHOOL	MAJOR
TRANS	GRADUATE SCHOOL	CROSS REGISTRANT

ISSUED TO: Christopher Pryby

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COURSE	DESCRIPTION	HOURS CARRIED	GRADE	HOURS EARNED	AVERAGE TERM	AVERAGE CUM
*****	UNIVERSITY SYSTEM OF GEORGIA IMMUNIZATION REQUIREMENTS SATISFIED					
	CREDIT FROM TESTING SUMMER 2004					
CHEM 1211	S2-FRESHMAN CHEM I	3.0	K	3.0		
CHEM 1211L	S2-FRESHM CHEM LAB	1.0	K	1.0		
CHEM 1212	AP-FRESHMAN CHEM II	3.0	K	3.0		
CHEM 1212L	AP-FRESHM CHEM LAB	1.0	K	1.0		
ENGL 1101	S2-ENGLISH COMP I	3.0	K	3.0		
ENGL 1102	AP-ENGLISH COMP II	3.0	K	3.0		
HIST 2111	AP-AM HISTORY TO 18	3.0	K	3.0		
HIST 2112	AP-AMER HIS SNC 186	3.0	K	3.0		
HIST 2701	S2-WORLD CIV I	3.0	K	3.0		
HIST 2702	S2-WORLD CIV II	3.0	K	3.0		
MATH 1101	S2-INTRO MATH MODEL	0.0		0.0		
MATH 1113	AP-PRECALCULUS	3.0	K	3.0		
MATH 2200	AP-ANALY GEO AND CA	3.0	K	3.0		
PHYS 1111	AP-INTRO PHYS MECH	4.0	K	4.0		
PHYS 1112	AP-INTRO PHYS ELEC	4.0	K	4.0		
POLS 1101	AP-AMERICAN GOVERNM	3.0	K	3.0		
PSYC 1101	AP-ELEM PSYCHOLOGY	3.0	K	3.0		
	FALL SEMESTER 2004					
DRAM 2100H	APPREC THEATRE HON	3.0	A	3.0		
ECON 2105	PRIN OF MACROECON	3.0	A	3.0		
HONS 1000H	INTRO TO HONORS	1.0	S	1.0		
LING 2100	STUDY OF LANGUAGE	3.0	A	3.0		
MATH 2400H	DIF CALC THRY HNRS	4.0	A	4.0	4.00	4.00
	PRESIDENTIAL SCHOLAR					
	SPRING SEMESTER 2005					
BIOL 1103	CONCEPTS IN BIOLOGY	3.0	A	3.0		
CSCI 1301	INTRO TO COMPUTING	4.0	A	4.0		
FRES 1010	FRESHMAN SEMINAR	1.0	W	0.0		
INTL 1100H	INTRO GLOB ISSUES H	3.0	A	3.0		
MATH 2410H	INT CALC THRY HNRS	4.0	A	4.0		
MATH 3220	ADV PROB SOLV	1.0	S	1.0		
SOCI 1101H	INTRO SOCIOLOGY	3.0	A	3.0	4.00	4.00
	PRESIDENTIAL SCHOLAR					
	CREDIT FROM TESTING SUMMER 2005					
SPAN 1002	DP-ELEMENTARY SPANI	4.0	K	4.0		

COURSE	DESCRIPTION	HOURS CARRIED	GRADE	HOURS EARNED	AVERAGE TERM	AVERAGE CUM
	SUMMER SEMESTER 2005					
MATH 2700	ELEM DIFF EQNS	3.0	A	3.0		
PEDB 1950	FFL WALKING	1.0	S	1.0	4.00	4.00
	FALL SEMESTER 2005					
ASTR 1110H	INTRO ASTRO HONORS	3.0	A	3.0		
ASTR 1110L	H-INTRO AST HNRS LA	1.0	A	1.0		
CSCI 2670	INTRO THEORY COMPUT	4.0	A	4.0		
ECON 2106	G-PRIN OF MICROECON	3.0	A	3.0		
HIST 2312H	WEST SOC SINCE 1500	3.0	A	3.0		
HONS 1990H	HON COLL SEM	1.0	W	0.0		
MATH 3500	H-MULTIVAR MATH I	3.0	A	3.0	4.00	4.00
	PRESIDENTIAL SCHOLAR					
	SPRING SEMESTER 2006					
CSCI 1302	SOFT DEVELOPMENT	4.0	A	4.0		
CSCI 1730	SYSTEMS PROGRAMMING	4.0	A	4.0		
DRAM 2131H	AM ETHNIC CINEMA	3.0	A	3.0		
MATH 3510	H-MULTIVAR MATH II	3.0	A	3.0		
MATH 6690	H-GRAPH THEORY	3.0	A	3.0		
PEDB 1080	BEG BOWLING	1.0	S	1.0	4.00	4.00
	PRESIDENTIAL SCHOLAR					
	SUMMER SEMESTER 2006					
CSCI 2720	DATA STRUCTURES	4.0	A	4.0		
MATH 6050	H-ADV LIN ALG	3.0	A-	3.0	3.87	3.99
	DEAN'S LIST					
	FALL SEMESTER 2006					
CSCI 4612	INTRO QUANT COMP	4.0	A	4.0		
CSCI 4720	COMPUTER ARCH	4.0	A	4.0		
HONS 1990H	HON COLL SEM	1.0	S	1.0		
MATH 6000	H-MOD ALG & GEOM I	3.0	A	3.0		
MATH 6200	H-POINT SET TOPOLOG	3.0	A	3.0	4.00	3.99
	PRESIDENTIAL SCHOLAR					
	SPRING SEMESTER 2007					
CSCI 4570	COMPILERS	4.0	A	4.0		
DRAM 2010	INTRO TO ACTING	3.0	A	3.0		
MATH 6010	H-MOD ALG & GEOM II	3.0	B-	3.0		
MATH 6670	COMBINATORICS	3.0	W	0.0		
MATH 6900	H-TOPICS IN MATH	3.0	A	3.0	3.70	3.95

CONTINUED PAGE 2

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COURSE	DESCRIPTION	HOURS CARRIED	GRADE	HOURS EARNED	AVERAGE TERM	AVERAGE CUM
	SUMMER SEMESTER 2007					
DRAM 5580	PERFORMANCE TOPICS	3.0	A	3.0		
DRAM 5580	PERFORMANCE TOPICS	3.0	A	3.0	4.00	3.96
	DEAN'S LIST					
	FALL SEMESTER 2007					
DRAM 3020	BASIC DRAM WRITING	3.0	A	3.0		
DRAM 3500	FOUND OF ACTING	3.0	A	3.0		
MATH 4450	COMP NUMBER THY	3.0	A	3.0		
MATH 6220	DIFF TOPOLOGY	3.0	A	3.0	4.00	3.96
	SPRING SEMESTER 2008					
DRAM 2040	APPLIED DRAMA LAB	1.0	A	1.0		
DRAM 4210	THEA HISTORY II	3.0	A	3.0		
DRAM 5010	SCENE STUDY	3.0	A	3.0		
MATH 4400	NUMBER THEORY *R*	3.0	W	0.0		
MATH 6250	DIFF GEOMETRY	3.0	A	3.0		
SPAN 2001	INTERM SPAN	3.0	A	3.0	4.00	3.96
	GRADUATED MAY 10, 2008 BS DEGREE,					
	MAJOR MATHEMATICS					
	SUMMA CUM LAUDE					
	ELECTED PHI BETA KAPPA					
	MINOR THEATRE					
	FALL SEMESTER 2008					
CSCI 4470	ALGORITHMS	4.0	A	4.0		
DANC 1607	BALLROOM FOUND I	1.0	S	1.0		
DRAM 3300	FOUND OF PERF DESGN	3.0	WP	0.0		
MATH 4950	RESEARCH MATH	1.0	S	1.0		
MATH 8000	ALGEBRA I	3.0	A	3.0		
MATH 8100	REAL ANALYSIS I	3.0	B+	3.0	3.79	3.95
	SPRING SEMESTER 2009					
CSCI 4070	GAME PROGRAMMING	4.0	A	4.0		
GRMN 1001	ELE GERMAN I	4.0	A	4.0		
MATH 4400	NUMBER THEORY	3.0	A	3.0		
MATH 8170	FUNC ANALYSIS I	3.0	A	3.0		
MATH 8850	COLLAB RESEARCH	3.0	S	3.0	4.00	3.95
	PRESIDENTIAL SCHOLAR					
	REQUIREMENTS COMPLETED FOR ADDITIONAL MAJOR IN					
	COMPUTER SCIENCE					

COURSE	DESCRIPTION	HOURS CARRIED	GRADE	HOURS EARNED	AVERAGE TERM	AVERAGE CUM
	ADMITTED TO GRADUATE SCHOOL TRANS DEGREE 12-08-2011					
	AVERAGES RESTARTED					
	SPRING SEMESTER 2012					
MATH 8410	ALG/AN NUMBER TH II	3.0	A	3.0	4.00	4.00
	GRADUATE COURSE AVG					3.80
	END OF TRANSCRIPT					

The University of Georgia
Office of the Registrar
Transcript Guide

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Course Numbering

Semester	Quarter	
0001 – 0999	001 – 099	Non-credit; academic enhancement
1000 – 1999	100 – 199	Freshmen and Sophomores
2000 – 2999	200 – 299	Sophomores
3000 – 3999	300 – 399	Juniors and Seniors
4000 – 5999	400 – 599	Juniors and Seniors
6000 – 7999	600 – 799	Graduate students
8000 – 9999	800 – 999	Graduate students only

Course Codes Definitions

H	Honors Program
N	Part of University Evening Classes
C and G	Independent Study (G=resident credit; C=non-resident Credit)
E	Credit by course challenge
IS	In-Service
AP	Advanced Placement
DP	Departmental Placement Exam
IB	International Baccalaureate Program
S2	SAT II Tests
CE and CT	CLEP
R	Repeated courses. Results in forfeiture of the previous credit hours. Both grades are computed in GPAs.
A	Repeated courses. Included in GPAs and attempted credit hours.
I	Repeated courses. Included in GPAs, attempted and earned credit hours.

Grading Scales

Effective Summer 2006

Grades	Quality Points per Credit Hour
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
C-	1.7
D	1.0
F	0.0
WF	0.0

Fall 1969 – Spring 2006

Grades	Quality Points per Credit Hour
A	4.0
B	3.0
C	2.0
D	1.0
F	0.0
WF	0.0

School of Law Grading Scale

Grades	Quality Points per Credit Hour	Grades	Quality Points per Credit Hour
A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D+	1.3
B	3.0	D	1.0
B-	2.7	F	0.0

Re-Enrollment Policy
A student is academically eligible to re-enroll in the University unless otherwise noted on the student's transcript.

Attempted Courses Policy
All courses attempted by a student will be included on the student's transcript, including UGA courses from which the student withdrew and received no hourly credit and courses transferred to the University from another accredited institution.

Other Grading Marks

I	Incomplete: Doing satisfactory work but unable to complete course by deadline for some reason beyond student's control.
WF	Withdrawn/Failing: Unsatisfactory work at time of withdrawal or student met maximum of 4 WPs (effective Fall 2008). Included in GPA as an F.

Grading Marks Not Included in GPA Calculations

W	Withdrawn: Prior to Fall 2008, permitted to withdraw from course without academic penalty.
WP	Withdrawn/Passing: Effective Fall 2008, undergraduate students limited to four (4) WPs during their undergraduate career.
WU	Withdrawn/Unsatisfactory from a Satisfactory/Unsatisfactory course.
WM	Military Withdrawal: Involuntary activation.
S	Satisfactory in a Satisfactory/Unsatisfactory course.
U	Unsatisfactory in a Satisfactory/Unsatisfactory course.
K	Credit by examination, effective Summer 1976.
AU	Audit: Prior to Summer 1976.
V	Audit: Effective Summer 1976.
NR	Grades for entire course not received in time for processing. NR is replaced upon receipt of official grade change form from instructor.
ER	Grade not submitted by instructor. Failure to be removed by end of subsequent term results in a conversion to WF.
NG	No grade reported by instructor at the time of processing.

Withdrawal Policy Effective Fall 2008:
Undergraduate students limited to four (4) WPs during their undergraduate career. Once four WPs are received, only grades of WF can be assigned. Hardship Withdrawals (as approved by VP for Student Affairs Office) and Military Withdrawals are not counted in maximum of four WPs.

The University System of Georgia converted from the quarter system to the semester system effective Fall Semester 1998, with the academic year consisting of two 15 week semesters, along with Summer Semester.

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Transcript guide modified August 2014.

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Christopher Ian Pryby
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(478) 320-3684 • cpryby@gmail.com

The following writing sample is an excerpt of the opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Ghanem*, 993 F.3d 1113 (9th Cir. 2021), delivered by the Honorable Danny J. Boggs, sitting by designation. Judge Boggs has given me permission to use this work as a writing sample. Although Judge Boggs and the panel made edits and substantive changes to the opinion before its publication, a large majority of the portion excerpted below represents my own work.

For the sake of clarity and brevity, I have omitted several sections of the opinion and footnotes 1 and 3. I have also made slight alterations—signified by square brackets—to the text of the opinion.

Background:

The defendant, Rami Ghanem, is a naturalized United States citizen who lived overseas. Mr. Ghanem dealt weapons on the black market. An undercover Homeland Security Investigations agent lured Mr. Ghanem to a sting operation in Athens, Greece, where Greek police arrested him. Mr. Ghanem was indicted in the Central District of California on export violations and smuggling and money-laundering charges, and he was extradited to the United States. The United States Marshals Service escorted him, in custody, on a flight from Greece to John F. Kennedy Airport in Queens, New York. After changing planes, Mr. Ghanem was flown to the Central District of California, where he remained until trial.

A grand jury then brought additional charges against Mr. Ghanem, including one count of violating 18 U.S.C. § 2332g, prohibiting illicit dealings in guided surface-to-air missiles. The indictment did not allege that Mr. Ghanem had committed this crime in the Central District of California—only that he was present in the district when the indictment was returned. Mr. Ghanem did not move to dismiss the count for improper venue before trial. Instead, after the government concluded its case-in-chief, he moved for a judgment of acquittal, raising the venue problem for the first time through that motion. The district court denied the motion, finding that Mr. Ghanem had waived his venue objection by failing to raise it before trial. Further, the district court, over Mr. Ghanem's objection, instructed the jury: "Arrests, restraint or detention in a foreign country is irrelevant to your determination of whether venue is appropriate in this district."

The jury convicted Mr. Ghanem on the § 2332g charge, which carried a 25-year minimum sentence. Mr. Ghanem appealed his conviction on the grounds that venue was improper in the Central District of California and that the jury instruction on venue was erroneous. His argument that venue is improper rested on the interpretation of 18 U.S.C. § 3238, which states that the trial for a crime committed outside the United States "shall be in the district in which the offender . . . is arrested or is first brought."

II. Venue and Waiver

A. Background Principles

[. . .]

Neither party disputes that all Mr. Ghanem's alleged conduct took place outside the United States, so that [18 U.S.C.] § 3238 applies. Rather, Mr. Ghanem contends that he was "arrested" in Greece and "first brought" to the Eastern District of New York. Because Greece is, of course, not in the United States, venue under § 3238 would then lie only in the Eastern District of New York. Thus, Mr. Ghanem argues, venue was improper in the Central District of California, and we should vacate his conviction.

But the government contends that Mr. Ghanem waived his venue objection. This is because "a motion alleging a defect in instituting the prosecution, including . . . improper venue," must be made before trial if its basis is "then reasonably available" and it "can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(A)(i). A motion that does not meet that deadline is untimely, "[b]ut a court may consider [it] if the [movant] shows good cause." Fed. R. Crim. P. 12(c)(3). And we have held that a failure to timely raise a pretrial objection required by Rule 12, "absent a showing of good cause," constitutes a waiver—we will not review the objection, even for plain error. *United States v. Guerrero*, 921 F.3d 895, 898 (9th Cir. 2019) (per curiam).

B. Apparency of a Venue Defect

There is good cause for a failure to raise a venue challenge before trial if no venue defect was "apparent on the face of the indictment." *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 (9th Cir. 2000). In such a case, the earliest a defendant can raise the issue is in a Rule 29 motion for a judgment of acquittal at the close of the government's case-in-chief. A venue objection made then is therefore timely. *Ibid.*

An indictment does not have an apparent venue defect if "it allege[s] facts which, if proven, would have sustained venue" in the district of trial. *Ibid.* In this analysis, we consider only the allegations in the indictment, and we take them as true. *United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir. 1997). Moreover, we must consider venue for each count separately, even if the same conduct is charged in multiple counts. *See United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994) ("The court must conduct a separate venue analysis for the substantive crimes and the conspiracy, even if the substantive crimes are committed in furtherance of the conspiracy.").

Here, a venue defect is apparent from the face of the indictment. The only mention of the Central District of California in count 3[, the § 2332g count,] is a statement that Mr. Ghanem "is currently located in the Central District of California." No overt act in count 3 is alleged to have occurred in any particular place, and no other facts are alleged in that count that would support venue under any of the venue statutes. *See* 18 U.S.C. §§ 3232–39; Fed. R. Crim. P. 18 ("Unless a statute or [the] rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."). Because mere presence in the district at the time of indictment does not support venue, count 3's defect was apparent.

Lacking good cause, Mr. Ghanem's first objection to venue—in his motion for acquittal after the close of the government's case—was untimely, and he therefore waived that venue challenge.

III. The Jury Instruction on Venue

Mr. Ghanem also challenges the propriety of the district court's venue instruction—that "[a]rrests, restraint or detention in a foreign country is irrelevant to [the jury's] determination of whether venue is appropriate in this district."

A. Preservation Below

To preserve a jury-instruction objection, a party "must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Mr. Ghanem did so here—before the jury was instructed, his counsel objected to the government's proposed revision, contending that Mr. Ghanem's arrest in Greece was in connection with the surface-to-air missile charges and therefore he had not been first deprived of his liberty in California. And he continues to press on appeal the same argument he made below: that he was not "arrested" in the Central District of California because he was not first restrained of his liberty there. Rather, he was arrested in Greece in connection with the entire arms-trafficking scheme, including the alleged § 2332g offense, so his overseas arrest is relevant to the jury's venue determination. He therefore preserved that challenge, and we review de novo whether the instruction correctly stated the law. *United States v. Renzi*, 769 F.3d 731, 755 (9th Cir. 2014).

Additionally, according to our precedent, Mr. Ghanem's Rule 12 waiver of venue does not preclude his separate jury-instruction challenge.[2] *United States v. Casch*, 448 F.3d 1115, 1117–18 (9th Cir. 2006). In *Casch*, the defendant did not raise a venue challenge until his objection to a lack of a "jurisdictional element" in the jury instructions. *Casch*, No. 05-30270, Brief of Plaintiff-Appellee United States, 2005 WL 4668741, at *29–31 (Dec. 9, 2005). Even though he had waived his venue challenge under Rule 12, and despite the government's argument that waiver applied, *ibid.*, we did not find waiver of the jury-instruction challenge. Instead, we proceeded to the merits,

[2] Several circuits have adopted a contrary rule. *See United States v. Perez*, 280 F.3d 318, 334 (3d Cir. 2002) ("An issue that has been waived because no one has objected to it should not at the same time be 'in issue' so as to require a jury instruction."); *see also United States v. Massa*, 686 F.2d 526, 530–31 (7th Cir. 1982); *United States v. Winship*, 724 F.2d 1116, 1125–26 (5th Cir. 1984); *United States v. Haire*, 371 F.3d 833, 840 (D.C. Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005) (mem.).

and we found the district court's failure to instruct the jury on venue to be error, but we affirmed because the error was harmless. *Casch*, 448 F.3d at 1117–18.

B. Where Venue Lay Under § 3238

[. . .]

1. "First Brought"

The district a defendant is first brought to is the district into which the defendant first comes "[from outside the United States' jurisdiction] while in custody." *United States v. Liang*, 224 F.3d 1057, 1060 (9th Cir. 2000) (alteration in original) (quoting *United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989)). The "first brought" portion of § 3238 applies only if the defendant "is returned to the United States already in custody," *ibid.*, in connection with the offense at issue, *United States v. Layton*, 519 F. Supp. 942, 943 (N.D. Cal. 1981). Thus, if the defendant is *not* in custody in connection with that offense when he enters the United States, this provision does not apply. *See United States v. Erdos*, 474 F.2d 157, 160–61 (4th Cir. 1973) (holding that defendant was not in custody when plane to United States landed in Boston, hence venue did not lie in Massachusetts for overseas killing).

[. . .]

3. "In Connection With"

Here, it is undisputed that Mr. Ghanem was in custody when brought to the United States from Greece by air. And it is undisputed that he first landed in the Eastern District of New York before continuing on to the Central District of California.

What the parties dispute is whether Mr. Ghanem's custody at that time—resulting from his arrest in Greece—was in connection with the alleged § 2332g offense. If not, then he would have been arrested for that offense in the United States, and his arrest in Greece would have indeed been

irrelevant to the jury's venue determination in the particular circumstances of this case. On the other hand, if a jury could have reasonably found that his arrest in Greece *was* in connection with the alleged § 2332g offense, then that finding would mean that he could *not* have been "arrested" under § 3238 for that offense in the Central District of California. Thus, if a jury could reasonably find that Mr. Ghanem's arrest in Athens was connected to the alleged § 2332g offense, the district court's instruction that foreign arrests, restraint, or detention was irrelevant to the jury's determination would have misstated the law.

a. Precedent and Other Case Law

The precise contours of when a deprivation of liberty is in connection with an offense for the purposes of § 3238 have not been defined in this circuit. We therefore survey our cases and those of our sister circuits to ascertain these contours.

We start with *Liang*, which is binding on us. There, at the time the defendant was deprived of his liberty, his vessel had been interdicted and boarded—and he was taken into custody for suspected alien-smuggling—within the District of Guam. 224 F.3d at 1061. The government then took him to the District of the Northern Mariana Islands, where he was indicted several months later with three alien-smuggling offenses. *Ibid.* But because the defendant had been first detained in Guam, within the territory of the United States, we held that, for purposes of § 3238, he had been arrested there, not in the Northern Mariana Islands. *Ibid.* We therefore ordered his indictment dismissed for improper venue. *Ibid.*

In *Liang*, we quoted approvingly an out-of-circuit case, *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954). Distinctive in *Provoo* is that the government was already investigating treason allegations, with which the defendant was ultimately charged, even though the military was detaining him for alleged sodomy. The Army detained him for four months in Maryland before

dropping the sodomy charge and taking the defendant to New York, where he was discharged from the service, handed over to the FBI, and charged with treason in the civilian courts. 215 F.2d at 538. The Second Circuit found that the Army's four-month detention of the defendant at the behest of the Justice Department was effectively an arrest for treason in Maryland. *Ibid.* Thus, venue under § 3238 did not lie in New York, and the treason conviction was vacated.

We also looked in *Liang* to another Second Circuit case, *United States v. Catino*, 735 F.2d 718 (2d Cir. 1984). There, the defendant had been convicted of drug charges in the Southern District of New York but did not report for the start of his sentence, instead obtaining a passport under a false name and using it to travel to and from France. *Id.* at 719–20. French police eventually arrested him for heroin trafficking, and he was removed from France after serving a prison term there. *Id.* at 720–21. Upon his arrival in the Eastern District of New York, federal agents arrested him for additional drug charges based on his conduct while a fugitive. *Id.* at 721. But those charges were dropped, and he was taken to the Southern District of New York to begin serving his outstanding sentence on drug charges. *Ibid.*

While in custody in the Southern District, he was indicted for the domestic bail-jumping offense (for failing to report for the sentence he was currently serving). *Ibid.* Before his trial on that charge, a superseding indictment added a count of using a passport issued under a false name while in France. *Ibid.* The defendant moved to dismiss the superseding indictment, arguing that venue for the charge lay exclusively in the Eastern District, where he was "first brought" under § 3238. *Id.* at 723–24. The Second Circuit rejected this argument and held that the defendant's arrest in the Eastern District was for the subsequent drug-trafficking charges, not the overseas passport charge. *See id.* at 724. Rather, because the passport charge was added more than two years later for substantively different conduct than what led to his arrest upon returning from France, his

first restraint of liberty in connection with the passport charge was actually in the Southern District, where he was serving his existing sentence when the passport charge was brought. *Ibid.* ("We need not concern ourselves with the term 'first brought,' as that applies only in situations where the offender is returned to the United States already in custody.").

In *United States v. Holmes*, 670 F.3d 586 (4th Cir. 2012), the Fourth Circuit took what it called an "offense-specific" approach, which it contrasted to an "indictment-specific" approach. *Id.* at 594–96. There, the defendant had been arrested in the Eastern District of Virginia on charges of sexual assault against his stepdaughter at an air force base in Japan, but the indictment was dismissed because he was still on active duty in the military, prohibiting his prosecution by civilian authorities. *Id.* at 589 & n.1. After his discharge from the Air Force, the government refiled the same charges in the same district, and the defendant was arrested in North Carolina and taken to the Eastern District of Virginia. *Id.* at 589. That indictment was dismissed—incorrectly, as it would later turn out—for lack of venue in the Eastern District of Virginia, and the government refiled the same charges hours later in that same district now that the defendant was present there in custody. *Id.* at 590.

The defendant appealed his eventual conviction, arguing that North Carolina was his place of first arrest on the charges because his initial arrest in Virginia was void because he was still in the military. *Id.* at 593. In answering the question of where the defendant had been first arrested, the Fourth Circuit held that "the relevant inquiry is not the district of arrest for a specific indictment in a case's procedural history, but rather the district of arrest for th[e] specific offense, even if there is a subsequent dismissal of the original indictment or filing of a subsequent indictment regarding that offense." *Id.* at 595. It found this analysis to "comport[] with the purpose of establishing venue"—allowing it "to be definitively determined based on the static location of where a

defendant is determined to be 'first arrested or brought' with respect to the offense." *Ibid.* Otherwise there would need to be "reevaluation of [venue] at each stage of any subsequent procedural developments as with subsequent or superseding indictments for the same offense." *Ibid.* Following this approach, the Fourth Circuit held that, because the defendant had initially been arrested in the Eastern District of Virginia, even though that arrest was improper, venue there was proper because the third indictment contained the same two charges as the first. *Id.* at 596–97.

The Fifth Circuit took a different, arguably "indictment-specific" approach in *United States v. Wharton*, 320 F.3d 526 (5th Cir. 2003). There, the defendant was arrested in the Middle District of Florida after prosecutors had filed a complaint in the Western District of Louisiana for conspiracy to murder his wife in Haiti and insurance-fraud charges based on that murder. *Id.* at 536. He was taken to Louisiana; while detained there, the government obtained a superseding indictment charging him with the foreign murder of his wife. *Ibid.* Looking to *Catino* as analogous, the Fifth Circuit held that the defendant's later indictment and arrest on murder while detained in the Western District of Louisiana was sufficient to lay venue for murder there, even though his previous arrest in Florida had been for conspiracy to murder the same victim. *Id.* at 536–37.

We also note a well-reasoned district court case, *United States v. Hong Vo*, 978 F. Supp. 2d 49 (D.D.C. 2013). There, the court held that, "for venue to lie in a particular district under the first clause of section 3238, a defendant must have been arrested or first brought in [sic] that district for the *same criminal conduct* as that which *ultimately gives rise* to the offenses charged, even if the charges are filed elsewhere." *Id.* at 60 (emphases added). The principal defendant had been arrested in Colorado on one count of conspiracy to commit bribery and visa fraud overseas. *Id.* at 51. Later, she was taken to the District of Columbia and indicted on substantive counts of bribery and visa fraud. *Id.* at 52. The court dismissed the District of Columbia indictment, holding that the

defendant's arrest in Colorado was in connection with the bribery and visa-fraud charges because the object of the conspiracy for which she had been arrested there was to commit those offenses. *Id.* at 62. Considering much the same body of case law as we do now, the district court expressly rejected *Wharton*, noting that the Fifth Circuit "did not explain why, when the defendant was arrested in Florida, he was not restrained 'in connection with' the foreign murder charge given the close factual link" to the conspiracy and insurance-fraud charges. *Id.* at 61. The district court further highlighted that "the link . . . between the charges at issue and the defendant's arrest [was] stronger than that in *Wharton*." *Ibid.*

A second defendant in *Hong Vo* had also been arrested in Colorado as a material witness. *Id.* at 51. When cooperation negotiations with the government broke down a few weeks later, that defendant was charged with conspiracy and later charged in the District of Columbia with bribery and visa fraud as a coconspirator. *Id.* at 51–52. The district court held that this defendant had also been arrested in Colorado in connection with those crimes, even though at the moment of arrest, the defendant had not been charged with any offense. *Id.* at 64. The court based this ruling on the fact that the government had considered the second defendant "to be a coconspirator and a target of the investigation." *Ibid.*

b. Extracting Relevant Considerations

From our precedent and other case law, we can identify several factors indicating when an arrest meets the important condition of being in connection with a later-added offense.

i. Centrality of a Later-Added Charge to the Reason for Arrest

First, if the later-charged offense is central to the reason for the initial arrest, then that arrest is in connection with that later-charged offense. We see this principle used in our own precedent. In *Liang*, the defendant was detained in Guam because government agents found him smuggling

people into the United States, and the charges later brought in the Northern Mariana Islands were for three counts of alien-smuggling. 224 F.3d at 1061. Thus, his initial arrest was connected to those later charges.

Likewise in other circuits. In *Holmes*, the defendant was first arrested for abusing his stepdaughter overseas, and the charges in the third indictment were for the same conduct. 670 F.3d at 588, 590. The Fourth Circuit held that the defendant's initial arrest was in connection with the offenses charged in the third indictment. *Id.* at 596. And in the *Hong Vo* district-court case within the D.C. Circuit, we see the same principle. The court there recognized the inherent connection between an arrest for conspiracy and later-added charges for the substantive offenses underlying that conspiracy. *See* 978 F. Supp. 2d at 60 ("[T]he required connection is present because Hong Vo's initial arrest was very closely related to the bribery and visa fraud counts: she was arrested on a charge of conspiracy to violate certain statutes and subsequently charged in a superseding indictment with overt acts violating those same statutes, all based on the same criminal scheme.").

In contrast, if the later-charged offense is less central to the reason for the arrest, then the arrest is less likely to be in connection with the later-charged offense. Thus, in *Catino*, where the reason for the defendant's initial arrest (drug importation) differed substantially from the defendant's later charge (passport fraud), venue was found to lie where the defendant was being detained once the later charge was brought. *See* 735 F.2d at 723–24. Of course, it is true that the passport fraud in *Catino* was *related* to the drug-importation charge—the defendant there used the fraudulently obtained passport to travel in and out of France while smuggling heroin, *Id.* at 720. But "connections, like relations, 'stop nowhere.'" *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The key is the centrality of the later-charged offenses to the initial arrest. The passport

fraud with which Mr. Catino was later charged was not at the heart of the ongoing heroin smuggling for which he was initially arrested at the airport.

The government points to *Wharton* in trying to show that the centrality of the later-added charge to the reason for arrest is immaterial. But, like the *Hong Vo* court, we disagree with the *Wharton* panel's reasoning. The plot to murder Mr. Wharton's wife was central to the insurance-fraud scheme—indeed, the initial indictment charged the defendant with conspiracy to kill his wife in Haiti. Indictment, *United States v. Wharton*, No. 5:00-cr-50066-DEW-RSP (W.D. La. Sept. 25, 2000), Dkt. No. 1. And the foreign-murder charge was not brought with the initial indictment because the Attorney General had not yet authorized it. Minute Entry, *Wharton*, No. 5:00-cr-50066-DEW-RSP (W.D. La. Nov. 2, 2000), Dkt. No. 22. We cannot accept that an arrest for conspiracy to kill a person is unrelated to a later-added substantive charge of killing that person.

ii. Lapse of Time Between the Arrest and a Later-Added Charge

Besides the centrality of the conduct charged to the stated reason for arrest, another principle we may garner from the case law is that the length of time between the arrest and a later-added charge can indicate how connected the charge is to the arrest. A short gap often reflects a close connection between the initial arrest and later charge. *See Liang*, 224 F.3d at 1058 (less than two months between arrest and indictment); *Holmes*, 670 F.3d at 589–90 (seven months between first and second indictments); *Hong Vo*, 978 F. Supp. 2d at 51–52 (just over one month between arrests in Colorado and indictment in D.C.). *But see Wharton*, 320 F.3d at 536 (five months between arrest in Florida and superseding indictment adding murder charge in Louisiana). A long span of time tends to indicate the opposite. *See Catino*, 735 F.2d at 721, 724 (over two years between initial arrest for drug charges and later indictment for passport fraud; defendant still in

custody for previously imposed prison sentence independent of either passport or new drug charges, not held on pretext).

iii. Government Conduct

The substantive and temporal relationships between the arrest and the later-charged offense are not all that matters. The court must still inquire into the government's conduct, which may indicate the purpose of the arrest. For example, in *Provoo*, the Army kept the defendant in custody nominally for sodomy, only to drop that charge and turn him over to civil authorities in a different district for treason allegations. Even though the alleged sodomy had no substantive relationship with the treason allegations, the Second Circuit held that it could not "blind [its] eyes to the fact that the real purpose in bringing [the defendant] to New York was to meet the wish of the Department of Justice to have him tried for treason under the indictment subsequently filed [t]here." 215 F.2d at 538.

Thus, evidence that a restraint of liberty is in connection with later-charged offenses includes active government investigation for those offenses at the time of the initial arrest. *See ibid.*; *accord Catino*, 735 F.2d at 720–21 (discussing the government's extradition request based on charges of importing heroin and conspiracy to import heroin, not passport violations); *see also Hong Vo*, 978 F. Supp. 2d at 64. *Contra Wharton*, 320 F.3d at 536–37 (holding that Florida arrest for insurance fraud and conspiracy to murder was unconnected to later substantive murder charge). Such evidence would also include continuing to detain the defendant on the offense of arrest despite unjustifiably delaying proceedings on that crime. *See Provoo*, 215 F.2d at 538. And the government's deliberate attempts to manipulate venue, as in *Provoo*, should draw great skepticism toward its claim that an arrest and later-added charge are unrelated. *See ibid.*

[. . .]

d. Application

We turn now to the crux of the matter: whether Mr. Ghanem's arrest in Greece was in connection with the alleged § 2332g offense. We hold that a jury could have reasonably found that it was, even under the preponderance standard to which the government must prove venue, *United States v. Moran-Garcia*, 966 F.3d 966, 969 (9th Cir. 2020).

First, the government itself has conceded the alleged § 2332g offense to be extremely similar to the conduct for which Mr. Ghanem was initially arrested. True, it was neither the exact charge alleged in the original indictment, as was the case in *Holmes*, nor a substantive count underlying an inchoate offense, as in *Hong Vo*. But in arguing to admit Mr. Ghanem's plea colloquy on the other charges as evidence at trial, the government characterized the counts to which Mr. Ghanem had pleaded as "too similar in time and too similar in nature" to be excluded under Federal Rule of Evidence 403. Dist. Ct. Dkt. No. 427, at 14. It further described Mr. Ghanem as "engaged in overlapping conspiracies during a very discrete period of time, between the middle of 2014 on through 2015. During those conspiracies he engaged in the same type of conduct that he is alleged to have been committed [sic] with respect to" the § 2332g count. *Id.* at 14–15. What is more, the government filed a motion to join the original and superseding indictments, arguing [that "[t]here is a substantial overlap of evidence on the charges in each indictment, and of persons with whom defendant conspired to commit the offenses alleged in each indictment."] Dist. Ct. Dkt. No. 170, at 6. With these concessions, we are inclined to think that the alleged § 2332g offense is sufficiently central to the conduct for which Mr. Ghanem was initially arrested in Athens.

Second, the circumstances surrounding the arrest strongly suggest that the government was actively investigating Mr. Ghanem's alleged surface-to-air-missile activities in the months before his arrest in Greece.[4]

Evidence of Mr. Ghanem's alleged dealings in Igla and Strela missiles came to the government through several sources. In March 2015, an undercover government agent had a conversation with Mr. Ghanem involving Igla missiles. In May 2015, an investigator with the Department of Homeland Security obtained a warrant to search Mr. Ghanem's Gmail account. From that search, he was able to identify several emails that the government later offered as evidence against Mr. Ghanem.

[. . .] Overall, the record makes clear that the government was aware of and investigating Mr. Ghanem's alleged missile transactions well before his arrest in Greece.

Given that active investigation, the government's one-year delay between Mr. Ghanem's arrest and the later indictment bringing the § 2332g charge does not significantly diminish the connection between the two. The government continued its investigation after the arrest—it performed a forensic analysis of the devices seized from Mr. Ghanem by the Greek authorities,

[4] The government's brief denies this, saying that "the evidence that defendant conspired to sell anti-aircraft missiles to Libyans was not discovered until after defendant had been arrested in the undercover operation. (GER 259, 292, 656, 687–688.)" Gov't Br. 36. ("GER" refers to "Government Excerpts of Record.") As the further discussion in this section will demonstrate, that proposition is inaccurate.

Moreover, the pages that the government's brief cites do not refute our finding. GER 259 is a page of trial transcript. There, HSI Special Agent Peterson describes government trial exhibit 201 as an email "sent from the defendant's gmail account . . . dated *May 14, 2016*" (emphasis added). But that is either a transcription error or an accurate transcription of the witness's factual error. The government submitted a copy of exhibit 201 along with its brief in this court. The exhibit plainly states "Sent: Tuesday, *May 6, 2014* 1:52 AM." (emphasis added). Also, as the government acknowledged in its brief, Mr. Ghanem had already been arrested in December 2015. It seems unlikely that in 2016 he still had access to his Gmail account from a California jail cell.

[. . .]

and the same HSI special agent got another warrant to access Mr. Ghanem's Gmail account in September 2016. The government used that investigation time to bolster its § 2332g charge. In fact, emails from Mr. Ghanem's Gmail account from later than May 2015 were introduced against him at trial regarding the Igla-operator transaction. So, even though it took somewhat longer for the government to bring the § 2332g charge than in many of the cases we surveyed above, the arrest and offense remain connected.

Third, the government also appears to have been aware of its venue problem. Count 3 of the superseding indictment expressly tried to tie venue to Mr. Ghanem's presence in the Central District of California at the time of indictment. And the government's inaccurate statement of the record on appeal, noted in [footnote 4], further suggests its awareness of the potential defect in venue. Taken together, these facts all suggest that the government deliberately took advantage of its theory of venue to bring the § 2332g charge in the wrong district. The government's claim—that the arrest and later-added charge were unrelated—should therefore be viewed with great skepticism.

Thus, because (1) the government has conceded in the district court that the conduct for which Mr. Ghanem was arrested was very similar to that for which he was charged in count 3 of the superseding indictment, (2) government agents were actively investigating Mr. Ghanem at the time of his arrest for the conduct that would later be the basis of that count, and (3) the facts support a view that the government tried to manipulate venue in this case, we hold that the jury could have reasonably found it more likely than not that Mr. Ghanem's arrest in Greece was connected to his alleged violation of § 2332g. Thus, the district court's instruction—that foreign arrests, restraint, or detention were irrelevant to the jury's venue determination—was erroneous.

Applicant Details

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BA/BS From	**Salisbury University**
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JD/LLB From	**Drexel University Thomas R. Kline School of Law** **https://drexel.edu/law**
Date of JD/LLB	**May 24, 2021**
Class Rank	**33%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Specialized Work Experience **Immigration**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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March 3rd, 2022
The Honorable Judge John D. Bates
United States District Court of the District of Columbia

To Whom it May Concern,

I am currently a law clerk at the Prince George's County District Court and am extremely interested in clerking for the Honorable Senior Judge John D. Bates for the 2022-23 clerkship term. It would be an honor to be able to work as a clerk in the US District Court of the District of Columbia and have the privilege to learn from such an established Judge.

During my summer internships, I was able to garner a wide variety of skills that have helped me in my legal career. In the summer of 2019, I was able to work at the American-Arab Anti-Discrimination Committee (ADC) in Washington, D.C. While at the ADC I was able to write not only legal memoranda, but also, Emergency Motions for clients in danger of imminent deportation and other motions presented to the Court. These tasks gave me invaluable experience with researching different governing statutes and different areas of law, both national and international. Much of my supervising attorneys' work required extensive background research on legislative policies, international treaties, and country conditions; I made sure that they had as much information as they needed and was always poised to draft memoranda to succinctly disseminate what I learned.

The following summer I was fortunate enough to work with the team at the Institute for Constitutional Advocacy and Protection at Georgetown Law (ICAP). At ICAP I gained more experience with researching different areas of law and legal writing, further honing my skills and developing a penchant for research and writing. I researched both established areas of law—including condemnation cases, civil rights law, electioneering laws, and the constitutionality of certain federal statutes—and burgeoning areas of law, such as online defamation and incitement to violence, and doxing. As there was little jurisprudence on these new areas of law, I had to delve deeper into my research, looking into different courts' decisions, legislative discourse, and any other avenue which could help me best advise my supervisors.

During my final semester of law school, I interned with the Honorable Judge Vivian Medinilla of the Delaware Superior Court and found myself able to use the skills I had acquired during my internships and schooling. I was tasked with not only researching for and writing memoranda for the Judge and her clerk, but also with deciding on and drafting approvals and denials for Motions to Dismiss and Rule 35 motions and drafting other opinions and orders for her Honor. I took this newfound expertise I gained from my internship with the Judge and brought it with me to the Prince George's County District Court.

Here at the District Court, I have had the privilege of working with many Judges, learning from their experiences, and witnessing their work. I have been able to observe the regular dockets and also learn about the holistic approach to justice here at the Court, helping run the Mental Health and Drug Courts used here. This opportunity at the Court has allowed me to research more pointed questions from the Judges, further developing and keeping sharp my research skills. Finally, I have been able to complete my tasks of reviewing, then approving or denying, Affidavit Judgments and Petitions for Expungement.

I believe that my experiences, legal research capabilities, and enthusiasm would make me a great fit to clerk for His Honor. Thank you for your consideration and I hope to hear from you soon!

Warmly,
Sarah Rahman

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Professional Summary: Judicial law clerk seeking full-time opportunities in the public legal sector. Strong passion and demonstrated experience in constitutional, legislative, and international law and policy issues, and with impact litigation.

EXPERIENCE

The Honorable Judge Lisa Hall-Johnson, District Court of Prince George's County Maryland
Judicial Law Clerk August 2021 – Present

- Researched and wrote memoranda on legal issues brought to me by different Judges
- Reviewed Affidavit Judgment requests and Expungement Petitions
- Assisted in running the Mental Health Court and Drug Court dockets

The Honorable Judge Vivian Medinilla at the Superior Court of Delaware Philadelphia, PA
Judicial Law Clerk January 2020 – May 2020

- Researched and wrote memoranda on a myriad of different legal issues brought to the court
- Decided on and drafted approvals and denials of Motions to Dismiss and Rule 35 Motions
- Drafted opinions and orders for Her Honor

The Institute for Constitutional Advocacy and Protection at Georgetown Law Washington, DC
Legal Intern May 2020 - August 2020

- Conducted legal and field research in areas of law including civil rights law, federal statutes including §1373, and electioneering law
- Researched and wrote memoranda on burgeoning areas of law, including online incitement to violence and online defamation
- Drafted legal memoranda on 18 U.S.C. § 1373 and online doxing
- Conducted research, edited, and checked citations for an amicus brief for *Jones v. Mississippi*, filed with the U.S. Supreme Court

American-Arab Anti-Discrimination Committee Washington, DC
Legal Intern June 2019 - August 2019

- Conducted legal and policy research on Constitutional, administrative, and legislative issues related to immigration, security and discrimination, and wrote office memoranda
- Wrote Emergency Motions for Stay and Motions to Reopen for imminent deportation cases in relation to the *Hamama v. Adducci*, impact litigation
- Conducted client intakes and calls with detained and non-detained clients in English and Arabic
- Attended meetings with other governmental agencies and NGOs regarding policy initiatives

EDUCATION

Drexel University Thomas R. Kline School of Law, GPA: 3.20 Philadelphia, PA
Juris Doctor May 2021

- Recipient of the Rising Advocate Scholarship
- Founding Member and Vice President of American Constitution Society
- Founding Member and Secretary of the Muslim Law Students Association

Salisbury University, GPA: 3.67 Salisbury, MD
Bachelor of Art, Political Science, *cum laude* May 2017

- National Panhellenic Council Executive Council Member
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Transcript Information Report

Unofficial Transcript

As of: Jun-01-2021

Student: Rahman, Sarah
Univ ID: 14324984
Level: LS

Overall Cum GPA: 3.20 Overall Earned Hrs: 86.00

***Overall Earned Hrs incld Institutional & Transfer Credits*

Term: 201811 Fall Semester 18-19

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 550S 002	Torts	4.00	B+		
LAW 552S 002	Contracts	4.00	B-		
LAW 554S 002	Civil Procedure	4.00	A-		
LAW 565S 004	Legal Methods I	3.00	B+		

Attd: 15.00 Earned: 15.00 GPA Hrs: 15.00 Pts: 48.67 Term GPA: 3.24
Cum Ernd: 15.00 Cum GPA Hrs: 15.00 Cum Pts: 48.67 Cum GPA: 3.24

Academic Standing: *Good Standing*

Term: 201831 Spring Semester 18-19

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 555S 001	Legislation and Regulation	3.00	B+		
LAW 556S 002	Property	4.00	A-		
LAW 558S 002	Criminal Law	4.00	A		
LAW 566S 004	Legal Methods II	3.00	B-		

Attd: 14.00 Earned: 14.00 GPA Hrs: 14.00 Pts: 48.68 Term GPA: 3.47
Cum Ernd: 29.00 Cum GPA Hrs: 29.00 Cum Pts: 97.35 Cum GPA: 3.35

Academic Standing: *Dean's List*

Term: 201911 Fall Semester 19-20

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 560S 002	Constitutional Law	4.00	B		
LAW 621S 001	Federal Courts	3.00	B-		
LAW 701S 130	Federal Income Tax	4.00	B		
LAW 830S 001	Professional Responsibility	3.00	B+		

Attd: 14.00 Earned: 14.00 GPA Hrs: 14.00 Pts: 42.00 Term GPA: 3.00
Cum Ernd: 43.00 Cum GPA Hrs: 43.00 Cum Pts: 139.35 Cum GPA: 3.24

Academic Standing: *Good Standing*

Term: 201931 Spring Semester 19-20

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 604S 001	Advanced Constitutional Law	3.00	P		
LAW 611S 001	Sex, Gender, & the Law	3.00	P		
LAW 644S 001	Family Law	3.00	P		
LAW 722S 001	Employment Law	3.00	P		
LAW 825S 001	Intl Human Rts Advoc & Prctce	2.00	P		

Attd: 14.00 Earned: 14.00 GPA Hrs: 0.00 Pts: 0.00 Term GPA: 0.00
Cum Ernd: 57.00 Cum GPA Hrs: 43.00 Cum Pts: 139.35 Cum GPA: 3.24

Academic Standing: *Good Standing*

Term: 202011 Fall Semester 20-21

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 640S 001	Education Law	3.00	B+		
LAW 670S 001	Crim Pro Invest	3.00	C		
LAW 700S 001	Business Organizations	4.00	B		
LAW 880S 130	Advanced Legal Research	2.00	B+		
LAW T680S 00	Constitutional Theory	3.00	A-		

Attd: 15.00 Earned: 15.00 GPA Hrs: 15.00 Pts: 45.66 Term GPA: 3.04
Cum Ernd: 72.00 Cum GPA Hrs: 58.00 Cum Pts: 185.01 Cum GPA: 3.18

Academic Standing: *Good Standing*

Term: 202031 Spring Semester 20-21

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Awarde*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 646S 001	Mediation and Arbitration	3.00	B		
LAW 654S 942	Lawyering Practice Seminar	2.00	A		
LAW 886S 941	Writing Strategies for the Bar	2.00	CR		
LAW 931S 002	Law Co-op	7.00	CR		

Attd: 14.00 Earned: 14.00 GPA Hrs: 5.00 Pts: 17.00 Term GPA: 3.40
Cum Ernd: 86.00 Cum GPA Hrs: 63.00 Cum Pts: 202.01 Cum GPA: 3.20

Academic Standing: *Dean's List*

This writing sample analyzes the constitutionality of federal regulation 8 U.S.C. § 1373. I believe that this sample shows my ability to analyze federal regulations and jurisprudence, constitutional interpretation and arguments, and lower court precedents. For this analysis, I researched caselaw from many different districts, the reasoning of those Courts, and potential arguments that could be used against my supervisor's argument. My supervising attorney required research in order to proffer a legal strategy for our client—I have received permission to use this writing sample and no information regarding the client or the Institute's strategy is included. The format of this memorandum was requested and does not follow the typical memorandum set-up.

MEMORANDUM

To: Amy Marshak

From: Sarah Rahman

Date: July 31, 2020

Subject: Constitutionality of 8 U.S.C. § 1373

I. Background

I believe a defense claiming § 1373 is unconstitutional, will likely be successful, considering the precedent regarding it in the different districts. Much of the time, when § 1373 is being scrutinized and litigated, federal funds are being withheld from states and localities due to their noncompliance with the statute. Courts tend to look past the conditions which are required to be met to receive the funds, and look to whether § 1373 is constitutional as a whole. Lower-level jurisprudent points to it being likely that a § 1373 challenge will be upheld—as long as one is able to argue that it violates the Tenth Amendment and regulates public, rather than private, actors.

II. Cases Finding 8 U.S.C. § 1373 Unconstitutional

Cases from a variety of districts have held, on varying grounds, that 8 U.S.C. § 1373 is unconstitutional. Courts have decided in favor of deeming the statute unconstitutional based on Tenth Amendment grounds, the Supreme Court's recent *Murphy* holding regarding the regulation of private actors and preemption of law, state policy decisions, and the spending States would be forced to do if § 1373 is enforced. Forcing States to forgo the ability to create

independent policy choices and regulations fits within the category of Tenth Amendment violations. A majority of Courts have concluded that § 1373, as it stands, is unconstitutional.

a. **Reasonings Used for Finding § 1373 Unconstitutional**

i. **Section 1373 violates the Tenth Amendment Anticommandeering Rule**

The Tenth Amendment of the Constitution reserves any power not given to the federal government for the States. U.S. Const. amend. X. A rule stemming from this amendment, which furthers protection for state sovereignty, is the Anticommandeering Rule; this rule states that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *County of Ocean v. Grewal*, 2020 U.S. Dist. LEXIS 133903 at *36 (D.N.J. 2020) (quoting *Printz v. United States*, 117 S. Ct. 2365 (1997)). According to the court in *County of Ocean*, the "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id*. at *37. Compelling states to act is not the only way for the federal government to violate the Anticommandeering Clause; "[t]he basic principle that Congress cannot issue direct orders to state legislatures" holds true for precluding states from acting. *City of Chicago v. Sessions*, 321 F.Supp. 3d 855, 867 (N.D. Ill. 2018).[1] In finding § 1373 unconstitutional, the court in *City of Chicago* interpreted the statute as the federal government "requir[ing] the States to govern according to Congress' instructions." *Id*. at 868.[2] Section 1373 issues "direct orders to state legislatures," requiring states to govern as

[1] This case was followed by *City of Chicago v. Barr*, 405 F.Supp. 3d 748 (N.D. Ill. 2019) and *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020). In the final case, the court found that, because of the Byrne JAG statute being outside of the Attorney General's authority—that being the basis of the lower court's—the court did not need to "reach the constitutionality of § 1373 under the Anticommandeering Doctrine of the Tenth Amendment." *City of Chicago v. Barr*, 961 F.3d 882, 931 (7th Cir. 2020)

[2] The court in *City of Evanston v. Barr*, 412 F.Supp. 3d 873, 879 (E.D. Ill. 2019) reaffirmed its lower court decision because the court had already granted summary judgment for the plaintiff and the court did not feel the need to revisit the constitutionality of § 1373. It also noted that it had dealt with this issue in *City of Chicago v. Barr*, 405 F.Supp. 3d 748 (N.D. Ill. 2019). *Id* at 880.

instructed by Congress. *Oregon v. Trump*, 406 F.Supp. 3d 940, 972 (D. Or. 2019). The statute is considered a directive to states and localities as a way for the federal government to control State governments and their legislative bodies. *Id*. Courts have viewed § 1373 as stripping power from local policy makers and giving it to "line-level employees who may decide whether or not to communicate with INS." *City of Chicago v. Sessions*, 321 F.Supp. 3d at 870.

The court also considered the "critical alternative" option states have—being able to choose to not participate in federal programs. *Id*. Section 1373 eliminates this decision-making power by directing the "functioning of local governments in contravention of Tenth Amendment principles." *Id*. at 872. Pursuant to the Anticommandeering Rule, states have the right to refuse helping the federal government enforce its programs—this refusal does not equate to impeding the federal government in its enforcement of its programs. *Oregon v. Trump*, 406 F.Supp. 3d at 972-73.

ii. Section 1373 does not allow states to follow their own policy initiative

Section 1373 forces States to forgo making rules that fit their own policy objectives, making State governments follow federal government policy initiatives instead. *City of Chicago v. Sessions*, 321 F.Supp. 3d at 869.[3] Not only does § 1373 supplement the federal government's decision-making power for that of the States', it also "undermines existing state and local policies and strips local policy makers of the power to decide for themselves whether to communicate with INS." *City & Cty. Of San Francisco v. Sessions*, 349 F.Supp. at 951.

[3] This consideration, of forcing states' policy directions to change, affects long standing policy objectives and ripples into different areas of State and local governance. *City of Chicago*, 321 F.Supp. 3d at 862. This court noted the necessity of Chicago as a "sanctuary city." *Id*. The ordinance maintaining this status is meant to also clarify "communications and enforcement relationship between the City and the federal government as well as the specific conduct City employees are prohibited from undertaking, given the City's view that such prohibited conduct would 'significantly harm[] the city's relationship with immigrant communities.'" *Id*. at 863.

iii. Section 1373 violates *Murphy* by only regulating public actors

Federal laws only preempt state laws when the federal law at issue governs private actors. *Oregon v. Trump*, 406 F.Supp. 3d 940, 972 (D. Or. 2019); *see Murphy v. NCAA*, 138 S. Ct. 1461 (2018). The court in *County of Ocean* found that § 1373 "regulate[s] only state and local governments and do[es] not, in any way, regulate private actors." *County of Ocean v. Grewal*, 2020 U.S. Dist. LEXIS 133903 at *27. Many courts have found that § 1373 is not a preemption provision because ""[b]y [its] plain terms, the provision[] affect[s] state and local government entities and officials; [it does] not regulate private actors as *Murphy* requires for preemption." *Id*. The court in *City & Cty. Of San Francisco v. Sessions* was not persuaded by the Department of Justice's argument that § 1373 preempted state laws in contravention of it because § 1373 does not regulate or provide extra rights for private actors. 349 F.Supp. 3d 924, 950 (N.D. Ca. 2018).[4]

iv. Section 1373 forces States to spend money and employ their employees as Congress sees fit

Not only does § 1373 place a heavy monetary burden on State and local governments, it also siphons them of control over their employees. *City of Chicago v. Sessions*, 321 F.Supp. 3d at 869. According to the court in *City of Chicago*, § 1373 "supplants local control of local officers; the statute precludes Chicago and localities like it, from limiting the amount of paid time its employees use to communicate with INS." *Id*. Section 1373 also "shifts a portion of immigration enforcement costs onto the states." *City & Cty. of San Francisco v. Sessions*, 349 F.Supp. 3d at 952. By forcing State and local governments to adhere to § 1373, they will have to devote manpower to completing the requests the statute mandates of them, divesting the governments of

[4] This court held that Plaintiffs' sanctuary laws did not violate § 1373 and that the Department of Justice could not withhold their Byrne's grants because of certain conditions being read into § 1373, the appellate court affirmed this reasoning. Because of this, the court did not go into the constitutional argument because the lower court dealt with the issue. *City & Cty. Of San Francisco v. Barr*, 2020 U.S. App. LEXIS 21741* (9th Cir. 2020).

their power to direct their employees as they see fit. *City of Chicago v. Sessions*, 321 F.Supp. 3d at 869.

III. Cases Finding 8 U.S.C. § 1373 Constitutional

Some courts have found § 1373 constitutional, and Attorney Generals have advocated for such a decision on the basis of federalism and preemption—federal law preempting state law, certain Anticommandeering carve-outs, and immigration being a main issue for the federal government. Preemption has not appeared to be a successful tactic in litigation involving the constitutionality of § 1373 but is worth noting, as immigration tends to be an area dominated by the federal government.

a. Arguments and Reasonings Used for Finding § 1373 Constitutional

i. Federal law preempts state law

Those in favor of upholding the constitutionality of § 1373 advocate that, as a federal law, the statute preempts any other laws from states or localities that might be in contravention to it. In order to determine whether a federal law might, in some way, preempt a State or locality's law, the court must determine whether the statute at issue is a "preemption provision." *County of Ocean v. Grewal*, 2020 U.S. Dist. LEXIS 133903 at *26 (N.J. 2020). There are three categories of preemption: express preemption, conflict preemption, and field preemption. *Id* at 24. According to the Supreme Court, all three categories work similarly:

> Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

Id. at 26-27.

If a statute is not found to be a preemption provision, it has not conferred rights upon a private actor, and state and local laws do not have to avoid being in contravention to it. *Id* at 27. An "express preemption" issue comes about when "there is an explicit statutory command that state law be displaced." *Id*. at 26. A state or local law fails under "conflict preemption" when the law conflicts with a federal law and the former places an obstacle in the achievement of the latter. *Id*. at 42. Lastly, a "field preemption" provision precludes States from regulating conduct in fields where Congress, acting within its constitutional authority, has determined that it must be regulated only by the federal government. *Id*. at 53. According to longstanding trends, the immigration field remains the realm of the federal government, but, in the INA "Congress contemplated that it was the province of the States to determine the extent to which its law enforcement agencies would participate in the enforcement of federal civil immigration law." *Id*. at 54.

ii. Section 1373 falls within the information sharing carve-out of the Anticommandeering Rule

According to the defendant in *City of Chicago v. Sessions*, there is a carve-out in the Anticommandeering Doctrine which allows for the preemption of statutes requiring information sharing. 321 F.Supp. 3d 855, 871 (N.D. Ill. 2018). This carve-out, according to Sessions, comes from the dicta in *Printz v. United States*, which the Court finds neither binding nor persuasive; where the Court did not elaborate when it stated that it would not decide on the constitutionality of "purely ministerial reporting requirements imposed by Congress on state and local authorities." *Id*. (quoting *Printz v. United States*, 521 U.S. 898, 936 (1997)).This argument did not persuade the court because of the nature of the carve-out—it was not elaborated upon in *Printz*, nor was it anything more than dicta in the opinion. *Id*.

iii. Immigration falls within the realm of the federal government

In *New York v. United States DOJ,* the court stated that the Supreme Court has made it clear that, in the realm of immigration policies and programs, the federal government has "broad" and "preeminent" power, codified in the statutory scheme. 951 F.3d 84, 90 (2d Cir. 2020). The court also mentions that states may not "pursue policies that undermine federal law." *Id* at 91. The court goes further to say that "[a] commandeering challenge to a federal statute depends on there being pertinent authority "reserved to the States,"" further stating that the courts should identify powers reserved to the states in the immigration context, giving them boundaries, within which they may legislate. *Id*. at 113. The court did consider § 1373 being unconstitutional on its face because the statute does not "violate the Tenth Amendment *as applied here*." *Id*. at 114.

Applicant Details

First Name	**Sara**
Last Name	**Riordan**
Citizenship Status	**U. S. Citizen**
Email Address	**scriordan94@gmail.com**
Address	**Address** Street **34 Stillwater Drive** City **Plymouth** State/Territory **Massachusetts** Zip **02360-5299** Country **United States**
Contact Phone Number	**5082727815**

Applicant Education

BA/BS From	**Westfield State College**
Date of BA/BS	**December 2015**
JD/LLB From	**Penn State Law** **http://pennstatelaw.psu.edu/**
Date of JD/LLB	**May 14, 2022**
Class Rank	**Below 50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ransom, Elizabeth
exr497@psu.edu
814-867-2792
Wiseman, Hannah
hwiseman@psu.edu
Houck, James
jwh32@psu.edu
(814) 865-4294

This applicant has certified that all data entered in this profile and any application documents are true and correct.

34 Stillwater Drive
Plymouth, MA 02360
(508) 272-7815
scriordan94@gmail.com

18 March 2022

US District Court
Washington, DC

Dear District Judge John D. Bates:

I am writing to express my interest in a clerkship for the 2022-2023 term. I am entering my final year of a dual JD/Masters of International Affairs at Penn State**.** I am seeking a clerkship in order to increase my experience working in court before entering into practice. Because of the COVID-19 pandemic most of my work experience in law school has been virtual, spending my first year after graduation as a clerk will allow me to use my research and writing experience while also gaining more in person court experience.

I graduated from Westfield State University *summa cum laude* in December of 2015. I then spent a year as an AmeriCorps VISTA with the East Boston YMCA, then working at the Hult International Business School in Cambridge, MA. During my law school summers I have had the opportunity to serve as a research assistant with several professors; take Arabic courses; and complete internships with The Harinko Group (THG), the Water Resource Action Project (WRAP), and Judge Suzanne Adams of New Work City.

Though my work, internships, and clinics I have experience in: research and writing on topics under American jurisdiction and in Africa and the Middle East; and contact and service with at risk populations. At Penn State all students take a Legal Research class where we learn the basic skill of conducting a successful search in all of the legal databases, as well as government records. I have gone on to build on this skill through my course work and employment. I have researched and written memos on such diverse topics as: US immigration policies; each of the Circuit Courts views on sovereign immunity; OSHA's guidelines; the relationship between increasing energy efficiency standards and improved health outcomes; and energy transition polices across several states. In addition, I also have experience researching and writing reports on law and polices in Native Nations, the Middle East, and Africa. Through my coursework for my Masters of International Affairs, research assistant positions, and the Sustainable International Development Clinic I have completed research on: water access and green energy polices on the Navajo and Hopi Nations; business transaction and rental agreements in Kenya; and energy transition polices in South Africa, Kenya, Morocco, and Bahrain. I have also had the chance to work with entrepreneurs in Kenya, members of the Navajo and Hopi Nations, and recent immigrants to the US where I have learned the value of listening to people's stores and working with them in order to advocate for them.

My resume is attached for your review. I would like to thank you for your time and consideration. Please feel free to contact me with any additional questions, my phone number is (508) 272-7815 and my email address is scriordan94@gmail.com.

Sincerely,
Sara Riordan

SARA RIORDAN

34 Stillwater Drive Plymouth, MA 02360-5299 • scriordan94@gmail.com • (508) 272-7815

EDUCATION

The Penn State University, University Park, PA — May 2022
Penn State Law, JD
The School for International Affairs, MA International Affairs

Westfield State University, Westfield, MA — December 2015
BA, Political Science
Concentrations: American Politics and International Relations
Minors: Gender Studies and History
Overall GPA: 3.806/4.000
Study Abroad: The Foundation for International Education, Spring Semester 2014

EXPERIENCE

The Pennsylvania State Law School – *Research Assistant for Professor Wiseman;* Penn State Law, PA — Jan 2020-August 2021
- Conducted research on the relationship between energy efficient buildings and increased health outcomes
- Tracked the implementation of Health in all Policies polices in each of the states
- Researched Energy Transition law in the US, Bahrain, Kenya, Morocco, South Africa, and Native American Nations

Penn State Law – *Research Assistant for Professor Foreman;* University Park, PA — June 2020 – August 2020
- Researched OSHA standards for workers during the COVID-19 pandemic
- Researched and complied a report on how qualified immunity is approached by each of the federal appellate circuits

The Harinko Group (THG) – *Intern;* Remote — June 2020 – August 2020
- Researched contact information for important stakeholders in the Lower Illinois River Valley
- Wrote op-eds on the subject of development and rural recovery in the Lower Illinois River Valley
- Researched survey methods and questions for a survey of stakeholders in the project

Water Resources Action Project (WRAP) - *Intern*; Remote — June 2020 – August 2020
- Researched and applied for corporate and foundation grants
- Reviewed and beta tested a new web application and website
- Wrote copy related to a project on the Navajo Nation for the website

Center for Immigrant's Rights Clinic – *Research Assistant*; University Park, PA — May 2019 – August 2019
- Researched case law and secondary sources on topics related to immigration law and the use of prosecutorial discretion
- Compiled the table of contents for a new textbook on Immigration Law and created and reviewed Blue Book citations
- Spoke at community events aimed to educate the public about current issues in immigration law and current events

Hult International Business School –*Visa Coordinator:* Cambridge, MA — February 2018 – August 2018
- Advised approximately two hundred international students on the US student visa application process
- Reviewed and approved the necessary financial documents for each of the student's visa's and issued their I-20 forms
- Conducted mock interviews with the students in order to prepare them for their embassy interviews

East Boston YMCA – *Immigrant Youth and Opportunity AmeriCorps VISTA;* East Boston, MA — October 2016 – October 2017
- Created a five hundred page Resource Binder to connect new immigrants with services within the community
- Recruited and trained volunteers to work in the New American Welcome Center
- Organized community events aimed to increase cross-cultural awareness within the community
- Wrote the curriculum for Citizenship Classes to prepare community members for the US Citizenship Exam

Haringey Liberal Democrat's Office, Campaign Division - *Intern;* London, United Kingdom — March – April 2014
- Directed volunteers in the organizations and distribution of mailing lists to constituents
- Data entry: survey responses, voter registration information, volunteer hours and donations, distributed mailing lists

Penn State Law Advising Transcript

Name: **Sara Riordan**
Student ID: **978335014**

Campus ID: SCR222
Print Date: 02/02/2022
Requestor: Sara Riordan

Beginning of Penn State Law Record

Fall 2018

Program: Penn State Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
PSLFY	900	CIVIL PROCEDURE	4.000	4.000	B-	10.680
PSLFY	908	LEG RES TLS & STRT	2.000	2.000	B	6.000
PSLFY	910	CRIMINAL LAW	3.000	3.000	B+	9.990
PSLFY	912	APP LEG ANL & WR I	3.000	3.000	B	9.000
PSLFY	925	TORTS	4.000	4.000	A-	14.680

			Attempted	Earned	GPA Units	Points
Term GPA	3.150	Term Totals	16.000	16.000	16.000	50.350
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.150	Comb Totals	16.000	16.000	16.000	50.350
SEM RANK: 54/126						
CUM RANK: 54/126						
Cum GPA	3.150	Cum Totals	16.000	16.000	16.000	50.350
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.150	Comb Totals	16.000	16.000	16.000	50.350

Spring 2019

Program: Penn State Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
PSLFY	903	CON LAW I	3.000	3.000	B-	8.010
PSLFY	905	CONTRACTS	4.000	4.000	B+	13.320
PSLFY	907	CRIMINAL PROCEDURE	3.000	3.000	B-	8.010
PSLFY	914	APP LEG AN & WR II	2.000	2.000	B-	5.340
PSLFY	920	PROPERTY	4.000	4.000	B+	13.320

			Attempted	Earned	GPA Units	Points
Term GPA	3.000	Term Totals	16.000	16.000	16.000	48.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.000	Comb Totals	16.000	16.000	16.000	48.000
SEM RANK: 66/121						
CUM RANK: 58/121						
Cum GPA	3.070	Cum Totals	32.000	32.000	32.000	98.350
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.070	Comb Totals	32.000	32.000	32.000	98.350

Spring 2020

Program: Penn State Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
CRMLW	970	INTL CRIMINAL LAW	3.000	3.000	CR	0.000

Penn State Law Advising Transcript

Name: **Sara Riordan**
Student ID: **978335014**

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	3.000	3.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	3.000	3.000	0.000	0.000
CUM RANK: 70/120						
Cum GPA	3.070	Cum Totals	35.000	35.000	32.000	98.350
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.070	Comb Totals	35.000	35.000	32.000	98.350

Fall 2020

Program: Penn State Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
IHSDC	900	INTL SUS DEV CLINC	4.000	4.000	A-	14.680
LWPER	947	NATIONAL SEC LW I	3.000	3.000	B+	9.990
PRORP	934	PRO REP	3.000	3.000	B-	8.010

			Attempted	Earned	GPA Units	Points
Term GPA	3.270	Term Totals	10.000	10.000	10.000	32.680
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.270	Comb Totals	10.000	10.000	10.000	32.680
SEM RANK: 70/134						
CUM RANK: 76/134						
Cum GPA	3.120	Cum Totals	45.000	45.000	42.000	131.030
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.120	Comb Totals	45.000	45.000	42.000	131.030

Spring 2021

Program: Penn State Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
EXPR	997	Special Topics	2.000	2.000	A-	7.340
Course Topic:		HMN RT, INTRS, & THE LAW				
EXPR	997	Special Topics	4.000	4.000	B+	13.320
Course Topic:		National Security Law II				
PROSK	955	EVIDENCE	3.000	3.000	B-	8.010

			Attempted	Earned	GPA Units	Points
Term GPA	3.190	Term Totals	9.000	9.000	9.000	28.670
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.190	Comb Totals	9.000	9.000	9.000	28.670
SEM RANK: 106/136						
CUM RANK: 85/136						
Cum GPA	3.130	Cum Totals	54.000	54.000	51.000	159.700
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.130	Comb Totals	54.000	54.000	51.000	159.700

Fall 2021

Program: Penn State Law (JD)
Plan: Law (JD) Major

Penn State Law Advising Transcript

Name: **Sara Riordan**
Student ID: **978335014**

Course		Description	Attempted	Earned	Grade	Points
EXPR	998	HIGHER ED LAW PRAC	3.000	3.000	B	9.000
GOVPL	952	ADMIN LAW	3.000	3.000	B-	8.010
INTR	971	INTERNATIONAL LAW	3.000	3.000	B	9.000
PROSK	997	Special Topics	2.000	2.000	P	0.000
Course Topic:		Writing/Editing for Lawyers				
ULWR	949	COMP CON LAW SEM	3.000	3.000	B+	9.990
ULWR	997	Special Topics	3.000	3.000	A	12.000
Course Topic:		Elect Sec & Foreign Int				

			Attempted	Earned	GPA Units	Points
Term GPA	3.200	Term Totals	17.000	17.000	15.000	48.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.200	Comb Totals	17.000	17.000	15.000	48.000
SEM RANK: 106/135						
CUM RANK: 93/135						
Cum GPA	3.150	Cum Totals	71.000	71.000	66.000	207.700
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.150	Comb Totals	71.000	71.000	66.000	207.700

Spring 2022

Program: Penn State Law (JD)
Plan: Law (JD) Major

Course		Description	Attempted	Earned	Grade	Points
BAREX	900	FUND SKIL BAR EXAM	2.000	0.000		0.000
IPLAW	951	INTERNET LAW	3.000	0.000		0.000
LABR	964	EMPLOYMENT DISCRIM	3.000	0.000		0.000
LWPER	948	LAW AND SEXUALITY	3.000	0.000		0.000
LWPER	997	Special Topics	3.000	0.000		0.000
Course Topic:		Native American Law				

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	14.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	14.000	0.000	0.000	0.000
Cum GPA	3.150	Cum Totals	85.000	71.000	66.000	207.700
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.150	Comb Totals	85.000	71.000	66.000	207.700

Penn State Law Career Totals

Cum GPA:	3.150	Cum Totals	85.000	71.000	66.000	207.700
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.150	Comb Totals	85.000	71.000	66.000	207.700

End of Penn State Law Advising Transcript

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Westfield STATE UNIVERSITY

TRANSCRIPT OF ACADEMIC RECORD

Record of:
Sara C. Riordan

Student ID: 022-80-7633
Date Issued: 16-FEB-2016

Course Level: Undergraduate

Current Program
College : Undergraduate Day School
Major : Political Science
Maj/Concentration : International Studies / Theory
American Politics
Minor : Women's and Gender Studies Min
History

Degrees Awarded Bachelor of Arts 30-DEC-2015
Primary Degree
Major : Political Science
Maj/Concentration : International Studies / Theory
American Politics
Minor : Women's and Gender Studies Min
History
Inst. Honors: Summa Cum Laude

SUBJ NO.	COURSE TITLE	CRED GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:				
2012	ADVANCED PLACEMENT			
BIOL 0104	HUMAN BIOLOGY	4.000 P		
BIOL 0106	BIOLOGY TODAY	4.000 P		
POLS 0101	AMERICAN NATL GOVT	3.000 P		
Ehrs:	11.000 QPts:	0.000		
GPA-Hrs:	0.000 GPA:	0.000		
INSTITUTION CREDIT:				
Fall 2012				
ART 0106	ART SURVEY I: PREHIST-MID AGE	3.000 A	12.000	
CRJU 0101	HNRS: INTRO TO CRIM JUSTICE	3.000 A	12.000	
ENGL 0105	HNRS: ENGLISH COMP I (HONORS)	3.000 A-	11.100	
********** CONTINUED ON NEXT COLUMN **********				

SUBJ NO.	COURSE TITLE	CRED GRD	PTS	R
Institution Information continued:				
POLS 0103	STATE & LOCAL GOVT	3.000 A	12.000	
PSYC 0101	INTRO TO PSYCHOLOGY	3.000 C+	6.900	
Ehrs:	15.000 QPts:	54.000		
GPA-Hrs:	15.000 GPA:	3.600		
Dean's List				
Spring 2013				
EGST 0102	INTRO WOMEN'S & GENDER STUDIES	3.000 A	12.000	
ENGL 0110	ENGLISH COMP II(HONORS)	3.000 A	12.000	
MATH 0111	MATH APPLICATIONS	3.000 A	12.000	
MOVP 0182	LIFE GUARD TRAINING	2.000 A	8.000	
MUSC 0160	HISTORY OF JAZZ	3.000 A	12.000	
POLS 0206	POLITICAL ANALYSIS	3.000 A	12.000	
Ehrs:	17.000 QPts:	68.000		
GPA-Hrs:	17.000 GPA:	4.000		
Dean's List				
Fall 2013				
ENGL 0228	HNRS: INTRO TO SHAKESPEARE	3.000 A	12.000	
LLIT 0202	WOMEN WRITERS OF AMERICAS:US	3.000 A	12.000	
POLS 0209	INTERNAT'L RELATIONS	3.000 A	12.000	
POLS 0215	AMERICAN POLITICAL THOUGHT	3.000 A	12.000	
POLS 0305	AMERICAN FOREIGN POLICY	3.000 A	12.000	
POLS 0321	AMERICAN PUBLIC POLICY	3.000 A	12.000	
********** CONTINUED ON PAGE 2 **********				

Issued To:
Sara Riordan
34 Stillwater Drive
Plymouth, MA 02360-5299

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John R. Ohotnicky, Registrar

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Westfield STATE UNIVERSITY

Page: 2

TRANSCRIPT OF ACADEMIC RECORD

Record of:
Sara C. Riordan

Student ID: 022-80-7633
Date Issued: 16-FEB-2016

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:					
Ehrs: 18.000 QPts: 72.000					
GPA-Hrs: 18.000 GPA: 4.000					
Dean's List					
Spring 2014					
ELEC 9998	ELECTIVE TRANSFER COURSE	3.000	B+	9.90	
POLS 0210	COMPARATIVE EUROPEAN GOVT	3.000	B+	9.90	
POLS 0211	COMPARATIVE FOREIGN POLICY	3.000	A	12.00	
POLS 9998	POLITICAL SCI ELEC TRANSFER	3.000	A	12.00	
POLS 9998	POLITICAL SCI ELEC TRANSFER	3.000	B	9.00	
CRS TKN AT FIE LONDON					
Ehrs: 15.000 QPts: 52.800					
GPA-Hrs: 15.000 GPA: 3.520					
Fall 2014					
CRJU 0312	WOMEN IN THE CRIM JUST SYSTEM	3.000	A	12.00	
ENGL 0297	HNRS: BEYOND OUR BORDERS	3.000	A-	11.10	
HIST 0215	INTRO:ASIA, AFRICA & MID EAST	3.000	B+	9.90	
LARA 0101	ARABIC I	3.000	A-	11.10	
MATH 0108	ELEMENTARY STATISTICS	3.000	B	9.00	
POLS 0306	POLITICAL CHANGE IN THE U.S.	3.000	A	12.00	
Ehrs: 18.000 QPts: 65.100					
GPA-Hrs: 18.000 GPA: 3.616					
Dean's List					
Spring 2015					
EGST 0230	ST:MEDICAL ANTHROPOLOGY	3.000	A	12.00	
********** CONTINUED ON NEXT COLUMN **********					

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:					
EGST 0303	SEM IN WOMEN'S STUDIES	3.000	A	11.100	
POLS 0211	COMPARATIVE FOREIGN POLICY	3.000	A	12.000	
POLS 0230	ASIAN POLITICS	3.000	A	12.000	
POLS 0307	HNRS: PRES & CONG:POL DYNMCS	3.000	A	12.000	
Ehrs: 15.000 QPts: 59.100					
GPA-Hrs: 15.000 GPA: 3.940					
Dean's List					
Fall 2015					
HIST 0102	WESTERN EXPERIENCE II	3.000	A	12.000	
HIST 0263	U.S. WOMAN'S HISTORY	3.000	A	12.000	
HIST 0273	LABOR & ECONOMIC HISTORY	3.000	A	12.000	
HIST 0290	History of Warfare	3.000	A	12.000	
HIST 0309	PRBL EUR HIST: FACES OF EVIL	3.000	A-	11.100	
Ehrs: 15.000 QPts: 59.100					
GPA-Hrs: 15.000 GPA: 3.940					
Dean's List					
********** TRANSCRIPT TOTALS **********					
INSTITUTION Ehrs: 113.000 QPts: 430.100					
GPA-Hrs: 113.000 GPA: 3.806					
OVERALL Ehrs: 124.000 QPts: 430.100					
GPA-Hrs: 113.000 GPA: 3.806					
********** END OF TRANSCRIPT **********					

Issued To:
Sara Riordan
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John R. Ohotnicky

John R. Ohotnicky, Registrar

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Memorandum

TO: NRC
FROM: Junior Associate
DATE: November 17, 2018
RE: Kenneth Walker/Amusement Park Accident – W7348-001

Questions Presented

Will Mr. Walker's claim for negligent infliction of emotional distress under New Mexico law survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted"? Is the grandparent grandchild relationship an intimate family relationship for a claim of Negligent Infliction of Emotional Distress? Did Mr. Walker have contemporaneous sensory perception of the accident at the Rio Grande Amusement park that resulted in his grandson's injuries when he heard his grandson scream, felt his grandson grab the back of his shirt to hold on, looked behind himself to see that his grandson was no longer in his seat, and arrived at the scene of the accident at the same time as the emergency medical team, but before medical treatment had begun?

Short Answers

Yes, Mr. Walker's claim for Negligent Infliction of Emotional Distress will survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Yes, the grandparent grandchild relationship is an intimate family relationship for a claim of Negligent Infliction of Emotional Distress under New Mexico law. Yes, Mr. Walker did have contemporaneous sensory perception his grandson's accident and injuries when: the accident occurred suddenly and he was aware while it was happening that it would cause severe bodily injury or death to his grandson; he arrived at the scene of the accident before medical personal

began treatment; and hearing his grandson's scream and felt his grandson grab at the back of his shirt before his grandson fell.

Statement of Facts

Kenneth Walker visited the Rio Grande Amusement Park in Albuquerque, New Mexico, with his two grandchildren, Tyler and Grace Johnson, over Labor Day weekend. While they were at the amusement park, Tyler was thrown off of the Grande Mountain rollercoaster and suffered severe head trauma and spinal cord injuries, as well as multiple fractures in his right arm and wrist. Mr. Walker and his grandchildren were sitting in a four-person compartment on the ride; Mr. Walker sat in the front two seats with Grace, while Tyler sat alone in one of the two seats directly behind them. Approximately halfway through the ride, Mr. Walker heard Tyler yell, "Help Grandpa!" and felt Tyler's hand grab at the back of his shirt. Shortly after, he looked at the seat behind him and saw that Tyler was no longer sitting behind him in the ride. When the ride came to a stop, Mr. Walker quickly exited the ride and was heard by the park employees yelling that his grandson had fallen from the ride; some of the witnesses described him as appearing to be hysterical. He then ran beneath the ride, and found Tyler laying where he had fallen at the same time as the emergency medical team arrived at the scene. He then accompanied Tyler in the ambulance to the hospital. At the hospital, Tyler was treated for his injuries, and Mr. Walker was treated for shock and advised to consult his personal physician if his symptoms continued. Over the next six weeks, Mr. Walker visited his personal physician six times. He experienced sleeplessness, back pain, headaches, and anxiety. As of October 17, 2018, all symptoms continue to persist.

Mr. Walker's daughter and grandchildren live in California; he lives in State College, Pennsylvania; and the amusement park is located in Albuquerque, New Mexico; the case will proceed in New Mexico federal district court under diversity jurisdiction.

Discussion

Mr. Walker has a valid claim for Negligent Infliction of Emotional Distress (NIED) under New Mexico law that will survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for "failure to state a claim upon with relief can be granted." Under New Mexico law, the elements to state a claim of NIED are: (1) the plaintiff and the victim have a marital or intimate family relationship, (2) the plaintiff had contemporaneous sensory perception of the accident, (3) the plaintiff suffered severe shock as a result of witnessing the accident, and (4) the accident caused physical injury or death to the victim. *Folz v. State,* 797 P.2d 246, 260 (N.M. 1990). Mr. Walker's grandson, Tyler, sustained serious injuries in the accident, and Mr. Walker suffered severe emotional distress as a result of witnesses the accident. Therefore, this memo will focus on whether or not the grandparent grandchild relationship is an intimate family relationship and whether Mr. Walker had a contemporaneous sensory perception of the accident.

A. Intimate Family Relationship

The grandparent grandchild relationship between Mr. Walker and Tyler is a qualifying intimate family relationship for a claim of NIED under New Mexico law. In *Ramirez* , which was the first case in New Mexico to recognize a claim for NIED, the intimate family relationships are, "husband and wife, parent and child, grandparent and grandchild, brother and sister . . . ." *Ramirez v. Armstrong,* 673 P.2d 822, 825 (N.M 1983). The rule for NIED was later altered under *Folz v. State,* and the list of qualifying relationships was omitted from the language, which now reads, "the plaintiff and the victim enjoyed a marital or intimate family relationship . . . ." *Folz,*

797 P.2d at 260. However, after this change in the language occurred there has been no legal challenge to the relationship between a grandparent and grandchild as one of the qualifying intimate family relationship. Therefore, Mr. Walker satisfies this element of the rule.

B. Contemporaneous Sensory Perception

Under New Mexico law, the conditions of contemporaneous sensory perception for NIED are: (1) the accident must be sudden and the plaintiff must be aware it will cause severe bodily injury or death to the victim while it is happening; (2) the plaintiff arrives at the scene of the accident before medical personal begin treatment; (3) and the plaintiff has a sensory perception of the accident. *See Gabaldon v. Jay-Bi Prop. Mgmt.*, 925 P.2d 510, 514-15 (N.M. 1996); *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774, 776 (N.M. 1988); *Acosta v. Castle Constr., Inc.*, 868 P.2d 673, 674 (N.M. Ct. App. 1994). Mr. Walker did have contemporaneous sensory perception of his grandson's accident. The accident happened suddenly, and he was aware that falling from a rollercoaster is likely to cause severe bodily harm or death. He had sensory perception of the accident when he heard his grandson scream as he fell and felt Tyler grab the back of his shirt to try and hold on. Further, while he reached Tyler under the rollercoaster at the same time as the EMT's, they had not yet began treatment when he reached his grandson under the ride.

The plaintiff has not contemporaneously perceived an injury-causing accident if the accident that caused the injury was not sudden and the plaintiff was not aware that it would cause severe bodily harm or death to the victim while it was happening. *Fernandez*, 968 P.2d at 776. The plaintiff's granddaughter was diagnosed with viral croup. *Id*. Her granddaughter was prescribed medication to prevent her throat from being blocked by inflammation. *Id*. The plaintiff's daughter filled the prescription at the defendant, a pharmacy, and gave a dose to the

plaintiff's granddaughter, unaware that the defendant had filled the prescription with the wrong medication. *Id*. During the night and the next morning, the plaintiff's granddaughter's condition worsened. The plaintiff and her daughter brought her granddaughter to the hospital, but her granddaughter began to suffocate on the way and stopped breathing. *Id.* at 776-77. Two days later, the granddaughter was removed from life support and died. *Id.* at 777. The court held that the plaintiff did not have contemporaneous sensory perception. The court reasoned that there was no single sudden event that caused the death of the plaintiff's granddaughter, but rather the death was the result of a series of events that occurred over time: the viral croup; the defendant's failure to properly train and supervise employees; the prescription being incorrectly filled; and the lack of knowledge that caused the plaintiff and her daughter to not seek treatment for her granddaughter sooner. *Id.* at 780. Additionally, while the plaintiff was aware of the viral croup and of her granddaughter's worsening condition, what she observed was a progression of injuries, not a single traumatic event, and she was unaware at the time that they would cause her granddaughter to die. *Id.* at 779. The court noted that, as a matter of policy, "The shock of seeing efforts to save the life of an injured [family member] in an ambulance or hospital . . . will not be compensated because it is a life experience that all may be expected to endure." *Id.* at 777. Only the observation of a sudden traumatic accident that one is aware will cause serious bodily harm or injury that is compensable under NIED because this is not an experience that most people will have to endure in their lifetimes. This makes it an exceptional event that one can seek compensation for. *Id.*

The accident that resulted in Tyler's injuries was sudden, and Mr. Walker was aware as it was happening that it was likely to cause Tyler severe bodily injury or death. Only a few minutes passed between when Mr. Walker and his grandchildren boarded the ride and when Mr. Walker

arrived at the location under the ride where Tyler landed after his fall. Additionally, when Tyler actually fell from the ride, only seconds passed from when he yelled "Help Grandpa!" and grabbed at the back of Mr. Walker's shirt to when Mr. Walker realized that Tyler was no longer sitting behind him. Only a few minutes passed between when Mr. Walker and his grandchildren boarded the ride, and when he arrived at Tyler's side beneath the ride, and only a few seconds passed between when he heard Tyler's scream and realized that he had fallen from the ride. Either, the few minutes or the few seconds constitute a sudden occurrence. Mr. Walker's distress upon realizing that his grandson was no longer sitting behind him, and his reaction when he exited the cart, both demonstrate his awareness that the fall was likely to have caused Tyler severe bodily injury or death. In contrast to *Fernandez,* Mr. Walker, upon realizing that his grandson had fallen, quickly arrived at the logical conclusion that a fall from a great height, such as the top of a rollercoaster, is likely to cause severe injury or death. Rio Grande Amusement Park may argue, that, according to the witnesses, Mr. Walker never said that his grandson was probably hurt or dying and was not aware of the potential harm. While it is true that, according to witness reports, he never said specifically what he thought happened to Tyler, all of the witnesses report that he was extremely upset. Some even used the word hysterical to describe him. If he had not believed his grandson was severely injured or dead, he would have had no reason to be hysterical when he exited the ride. Most people, upon realizing that someone had fallen from a rollercoaster, would come to the logical conclusion that such a fall would severally injure or kill the victim. This knowledge caused Mr. Walker's distress upon exiting the ride, which in turn, demonstrates his awareness of the likely outcome harmful of such a fall.

There is no contemporaneous sensory perception of an accident if the plaintiff is informed of the accident by a third party and arrives at the scene of the accident after medical

personnel have begun treatment. *Gabaldon,* 925 P.2d at 514-15. In *Gabaldon,* the plaintiff's son and daughter went to a water park as part of a summer recreation program. While they were at the water park, the son suffered a near-drowning in the wave pool. *Id.* at 510. The plaintiff's daughter, though at the water park, was not at the wave pool at the time of the accident and was told of the accident by another camp participant. *Id.* at 510. The plaintiff was at work and received a phone call informing her about the accident. *Id.* at 510. Both the plaintiff and her daughter rushed to where her son was and arrived after medical personal had begun treatment. *Id.* at 511. The court held that neither the plaintiff nor her daughter had contemporaneous sensory perception of the accident that led to the son's near drowning. *Id.* at 510. The court reasoned that the tort of NIED, "is not available to compensate the grief and despair to loved ones that invariably attend nearly every accidental death or serious injury." *Id.* at 513. The court further reasoned that, since neither the plaintiff nor her daughter arrived before the medical personal began treatment, there was no significant difference between what they witnessed and what someone witnessing a loved one being treated in a hospital would see. *Id.* at 515. *See also Fernandez,* 968 P.2d at 777 (witnessing a family member receive emergency medical care is something most people experience during their lifetimes and, therefore cannot lead to a claim of NIED.) Therefore, since the tort of NIED is not available to someone who witnesses a marital or intimate family member in a hospital, it is not available to those who arrived at the scene of a accident after medical personal have begun treatment. *Gabaldon,* 925 P.2d at 514. The court further reasons that being informed of a accident and arriving at the scene after medical personal have began treatment is a appropriate place to draw the line between recoverable and non-recoverable claims because witnessing a loved one receive medical treatment is a, "life experience that all may expect to endure." *Id.* at 514. Having a sensory perception of the

accident as it occurs or its immediate aftermath is not. *Id. See also Thistlethwaite v. Elements Behavioral Health, Inc.*, No. 14cv00138 WJ/RHS, 2015 U.S. Dist. LEXIS 187476 at *17-20 (D. N.M. July 2, 2014) (a claim for NIED cannot exist where the plaintiff did not witness the injuring accident. In *Thistlethwaite,* the plaintiff's son relapsed after the drug rehabilitation program he was enrolled in closed before the end of his treatment. The plaintiff's attempted to sue for NIED, but they were unable to because they were not in the same state as their son when he relapsed and, therefore, could not be considered witnesses.)

In contrast, the plaintiff does have contemporaneous sensory perception of the injuring accident if the plaintiff hears the victim scream and arrives at the scene of the accident before medical personnel. *Acosta*, 868 P.2d at 674. In *Acosta*, the plaintiff was a foreman on a construction project that his brother was also employed on. *Id.* at 674 On the day of the accident, the plaintiff heard a scream on the construction site and ran to see what had happened. *Id.* at 674. No more than eighteen seconds before he to arrived at the scene of the accident, where he saw that his brother had been electrocuted and his mouth and nostrils were smoking. *Id.* at 674. Upon arrival on the scene, the plaintiff took over preforming cardiopulmonary resuscitation until the ambulance arrived, his brother later died while being transported to the hospital. *Id.* at 674. The court held that the plaintiff did contemporaneously perceive the accident. *Id.* at 675. The court reasoned that hearing the screams constituted sensory perception because, "If the Court wanted to require presence and sight as elements, it could have easily done so, but it did not." *Id.* at 675. It is also important that, even though the plaintiff did not witness the accident as it happened, in arriving at the scene of the accident so soon after it occurred, he saw his brother in the same condition he was in at the time of the accident. Therefore, the court reasoned that there are other acceptable versions of sensory perception, and hearing the victim's screams, arriving before

medical personnel begin treatment, and witnessing the victim in the same state as they would have been at the time of the accident is one of them. *Id.* at 675.

Mr. Walker did arrive at the scene of Tyler's accident before medical personnel began treatment. Mr. Walker was on the rollercoaster with his grandson when he fell from the ride. As soon as the ride stopped, Mr. Walker got off of the ride and ran underneath it to where his grandson had landed. He arrived at his grandson at the same time as the EMT's. The defense counsel may argue that, since Mr. Walker arrived next to his grandson at the same time as the EMT's he does not satisfy this element of the rule; however, they would be incorrect. In order to satisfy the timing element, the plaintiff must arrive before medical treatment has begun, not before the medical personnel arrive. Since Mr. Walker and the EMT's arrived at the same time, he witnessed his grandson before they began treatment, in the same state as of the original accident. This is in contrast to the plaintiff in *Gabaldon*, since the EMT's had not arrived before Mr. Walker they had not begun medical treatment before he arrived. The condition he witnessed Tyler in was very different than it would have been if he had arrived after medical treatment had begun, or if he had not seen Tyler until he was in the hospital. This is most similar to the plaintiff in *Acosta*, Mr. Walker saw his grandson in the exact state created by his accident. Tyler had not yet received any medical treatment, the state he was in was substantially different than it would have been in a hospital and, subsequently, more distressing for Mr. Walker to witness.

Additionally, Mr. Walker did have sensory perception of Tyler's accident. Similar to the plaintiffs in *Gabaldon, Thistlethwaite,* and *Acosta,* Mr. Walker did not have visual perception of the injuring accident as it took place, specifically he did not see Tyler fall from the roller-coaster. However, unlike the plaintiff in *Gabaldon*, Mr. Walker was not informed of the accident by a third party. And, unlike the plaintiff in *Thistlethwaite*, he was in close proximity to the accident

when it occurred and did witness Tyler's injures first hand. Like the plaintiff in *Acosta,* Mr. Walker did have sensory perception of the accident, but it was not visual. He heard Tyler yell "Help Grandpa!" and felt him grab at the back of his shirt to try and hold on. As the court reasoned in *Acosta,* visual perception is not listed as a required element in the rule, sensory perception is. Of the five senses possessed by human beings - sight, hearing, smell, taste, and touch - Mr. Walker perceived his grandson's fall from the rollercoaster using two: hearing and touch. As discussed in *Gabaldon*, the sense of hearing can only apply if the plaintiff hears the accident first hand, not if they hear about the accident from a third party. Since Mr. Walker was sitting in front of his grandson and heard his screams first hand, this exception does not apply to this case. Similar to the plaintiff in *Acosta,* Mr. Walker heard Tyler's scream as the injuring accident occurred, and he realized as soon as he heard the scream that something had gone wrong. Unlike the plaintiff in *Acosta,* Mr. Walker also had sensory perception of Tyler's accident through a second sense, touch. At the same time as he screamed for help, Tyler grabbed onto the back of his grandfather's shirt to try to hold on. Mr. Walker was able to feel this touch, along with the moment Tyler's grip failed to hold him onto the ride and he fell.

Conclusion

Mr. Walker has a valid claim of Negligent Infliction of Emotional Distress as a result of his qualifying family relationship with his grandson and his contemporaneous sensory perception of the accident. His claim will survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Applicant Details

First Name	**Kathleen**
Middle Initial	**M**
Last Name	**Ritter**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **1330 Shore District Dr., Apt 2433** City **Austin** State/Territory **Texas** Zip **78741** Country **United States**
Contact Phone Number	**2145876688**

Applicant Education

BA/BS From	**Williams College**
Date of BA/BS	**June 2016**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 21, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Williams Institute Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

The Honorable John D. Bates.
U.S. District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
3333 Constitution Ave. NW
Washington, D.C., 20001

Dear Judge Bates:

I am a graduate of Columbia Law School and I am writing to express my interest in a clerkship in your chambers for the term beginning in August 2022 as your Rules Law Clerk. I am currently clerking for Justice Brett Busby on the Supreme Court of Texas, and hope after my clerkship to establish a career in litigation practice and, hopefully, academia. It would be a privilege to contribute to your work on the court and with the Standing Committee as your law clerk this fall.

During my time at Columbia, the opportunities I pursued provided me with both breadth and depth in legal research and writing. As a Research Assistant for Professor Olatunde Johnson, a moot court participant and coach, a Legal Fellow at Human Rights Campaign and a Summer Litigation Associate at Proskauer, I wrote myriad memoranda, briefs, complaints, policy memos, and legislative testimony. Additionally, I worked during law school as a judicial intern at the District Court for the Southern District of New York in Judge Paul Engelmayer's chambers, as well as at the Second Circuit Court of Appeals in Judge Gerard Lynch's chambers, so I am very familiar with both federal and state as well as district and appellate courts. Through those positions, I gained firsthand experience with the Federal Rules of Evidence and of Civil, Criminal, and Appellate Procedure.

After graduating, I spent eight months on a full-time pro bono secondment from Proskauer with the Appeals Division of the New York City Law Department. At the Law Department, I was responsible for deciding appellate strategy, researching and drafting appellate briefs, and communicating with city agencies on a wide variety of cases. Currently, as a clerk for the Supreme Court of Texas, I write bench and submission memos that are distributed to the entire Court, produce petition and case summaries, and draft opinions.

Prior to law school, I received a masters degree in History of Art from Oxford University, and intended to pursue an academic career in that field. Although my interests changed and I chose to attend law school rather than pursue a PhD, I believe my academic background and research experience make me an ideal candidate for this position. What drove my interest in art historical work—the requisite attention to detail, analytical thinking, and creative problem solving—also drive my legal interests in statutory and regulatory schemes and procedure. I believe my academic and legal experiences have made me well-equipped to handle the research, monitoring, and academic-adjacent responsibilities of this role.

I have included a resume, transcripts, writing sample, and letters of recommendation. I look forward to hearing from you.

Respectfully,
Katie Ritter

KATIE RITTER
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EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D. received May 2020
Honors: Harlan Fiske Stone Scholar 2017-2018, 2018-2019, 2019-2020
Myra Bradwell Award (for best student Note on women's issues and the law)
Publication: *We Are Not Struck by Blindness: The Establishment Clause and Religiously-Motivated State Preemption of Municipal Non-Discrimination Law*, 38 Colum. J. Gender & L. No. 1 (Spring 2020)
Activities: *Columbia Human Rights Law Review*, Articles Editor
Williams Institute Moot Court, Competition Team Member 1L, Coach 2L
Law Revue, Director
Teaching Fellow for Professor Tani (Torts), Fall 2018

UNIVERSITY OF OXFORD, ST. HUGH'S COLLEGE, Oxford, United Kingdom
MSt in the History of Art and Visual Culture, received July 2017

WILLIAMS COLLEGE, Williamstown, MA
B.A., *cum laude,* received May 2016
Major: Art History, Political Science Honors:
Highest Honors in Art History
Arthur B. Graves Prize for Essay in Art History (for senior thesis)

EXPERIENCE

SUPREME COURT OF TEXAS Austin, TX
Law Clerk, Chambers of Justice Brett Busby September 2021 - present
Draft opinions on behalf of Justice Busby, write petition review memos for entire Court recommending whether to grant or deny cases, write bench memos for entire Court, help Justice Busby prepare for oral argument.

NEW YORK CITY LAW DEPARTMENT, APPEALS DIVISION New York, NY
(On secondment from Proskauer) January 2021 – August 2021
Special Assistant Corporation Counsel
Handled appellate cases on behalf of the city of New York. Determined appellate strategy, researched and wrote appellate briefs.

COURT OF APPEALS FOR THE SECOND CIRCUIT New York, NY
Intern, Chambers of Judge Gerard E. Lynch September 2019 – December 2019
Conducted legal research and prepared bench memos for Judge Lynch for cases on appeal. Presented cases to clerks and Judge Lynch before sittings. Attended and observed oral arguments.

PROSKAUER ROSE, LLP New York, NY
Summer Associate May 2019 – July 2019
Conducted legal research for white collar sentencing proceeding. Prepared draft materials for bankruptcy litigation. Attended and took notes on collective bargaining negotiations. Wrote memoranda on a variety of legal and factual issues for ongoing matters.

SOUTHERN DISTRICT OF NEW YORK New York, NY
Intern, Chambers of Judge Paul A. Engelmayer January 2019 – May 2019
Worked with clerks and the Judge on drafting orders and opinions. Conducted research for ongoingcases. Attended and observed trials and hearings over which the Judge presided.

HUMAN RIGHTS CAMPAIGN Washington, D.C.
McCleary Law Fellow May 2018 – July 2018
Worked with HRC attorneys, lobbyists, and organizational allies on a wide range of projects including organizational contracts, comments on proposed regulations, model legislation, and issue testimony for Congress.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

NAME: Kathleen Martha Ritter
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SCHOOL: SCHOOL OF LAW

DEGREE(S) AWARDED: Juris Doctor (Doctor of Law) DATE AWARDED: May 20, 2020 PROGRAM: LAW

PROGRAM TITLE: LAW

HARLAN FISKE STONE SCHOLAR-FIRST YEAR ENDING MAY 18
HARLAN FISKE STONE - SECOND YEAR ENDING MAY 19
HARLAN FISKE STONE SCHOLAR-THIRD YEAR ENDING MAY 20
MANDATORY PRO BONO, 40 HOURS

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Fall 2017				
LAW	L 6101	CIVIL PROCEDURE	4.00	A-
LAW	L 6113	LEGAL METHODS	3.00	CR
LAW	L 6115	LEGAL PRACTICE WORKSHOP I	2.00	P
LAW	L 6118	TORTS	4.00	A
LAW	L 6133	CONSTITUTIONAL LAW	4.00	B+
Spring 2018				
LAW	L 6105	CONTRACTS	4.00	B+
LAW	L 6108	CRIMINAL LAW	3.00	B
LAW	L 6116	PROPERTY	4.00	B+
LAW	L 6121	LEGAL PRACTICE WORKSHOP I	1.00	HP
LAW	L 6169	LEGISLATION AND REGULATIO	3.00	A-
LAW	L 6874	WILLIAMS INSTITUTE MOOT C	0.00	CR
Fall 2018				
LAW	L 6204	ADMINISTRATIVE LAW	4.00	A-
LAW	L 6276	HUMAN RIGHTS	3.00	A-
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6675	MAJOR WRITING CREDIT	0.00	CR
LAW	L 6822	TEACHING FELLOWS	4.00	CR
LAW	L 6867	INDEPENDENT MOOT CT COACH	1.00	CR
LAW	L 8996	S THE CONSTITUTION	2.00	A-

L6822 WITH TANI, KAREN

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Spring 2019				
LAW	L 6341	COPYRIGHT LAW	4.00	B+
LAW	L 6355	HEALTH LAW	4.00	A-
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6661	EXT:FED CT CLERK SOUTHERN	1.00	CR
LAW	L 6661	EXT:FED CT CLERK SDNY-FLD	3.00	CR
LAW	L 6867	INDEPENDENT MOOT CT COACH	1.00	CR
Fall 2019				
LAW	L 6241	EVIDENCE	3.00	B+
LAW	L 6425	FEDERAL COURTS	4.00	B+
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	1.00	CR
LAW	L 6664	EXTERNSHIP:FED APPELLATE	1.00	CR
LAW	L 6664	EXTERNSHIP:FED APPELLATE	3.00	CR
LAW	L 8990	S CUR ISS CIVIL LIBERTIES	2.00	A
Spring 2020				

Due to the COVID-19 pandemic, Mandatory Pass/Fail grading was in effect for all regular, full-term courses for the spring 2020 semester.

AHIS	GR 6408	ORIGINS OF MOD VISUAL CUL	3.00	P
LAW	L 6293	ANTITRUST AND TRADE REGUL	3.00	CR
LAW	L 6625	JOURNAL OF GENDER AND LAW	1.00	CR
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	1.00	CR
LAW	L 6689	SUPERVISED RESEARCH: CRSE	2.00	CR
LAW	L 8671	S ART, CULTURAL HERTIAGE/	2.00	CR
LAW	L 9039	S LEG & ETHCL OBLGTNS COM	2.00	CR

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SEAL OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

Barry S. Kane
Associate Vice President and University Registrar

TO VERIFY AUTHENTICITY OF DOCUMENT, THE BLUE STRIP BELOW CONTAINS HEAT SENSITIVE INK WHICH DISAPPEARS UPON TOUCH

I wrote this brief in July 2021 while working for the Appeals Division of the New York City Law Department. It is being used as a writing sample with the knowledge and permission of my supervisors and has been lightly edited only for formatting and compliance with the NYCLD's style guide, not for substance. For purposes of this writing sample, I have omitted the brief's table of contents and table of authorities.

This case concerned transcripts from three criminal trials that the then-defendant, now plaintiff-appellant, was required by the trial court (Supreme Court) to produce as part of his civil claim for malicious prosecution and false arrest. Due to his repeated failure to comply with the orders requiring production of the transcripts, the trial court dismissed the case. Here, plaintiff-appellant argued that it was never his burden to produce the transcripts and the case was wrongfully dismissed. I argued on behalf of the City that the repeated failure to comply justified the trial court's dismissal.

PRELIMINARY STATEMENT

Plaintiff-Appellant Tyrone Larkin commenced this action in February 2007, alleging personal injuries resulting from his arrest in January 2003 and subsequent prosecution for criminal sale of a controlled substance and criminal sale of firearms. From July 2011 to April 2014, Supreme Court ordered Larkin to produce the transcripts from his criminal trials three times, but he failed to comply. Then, in November 2014, New York County Supreme Court (Chan, J.) issued a conditional order, directing Larkin to produce the transcripts within 30 days, or have his complaint automatically dismissed. But he did not produce the transcripts, and the complaint was dismissed.

Over the next four years, Larkin made intermittent attempts to vacate the dismissal, while still failing to comply with the court's discovery orders. He first filed a procedurally improper motion and then, a year and a half later, filed a corrected motion, but failed to appear twice for oral argument. Finally, in November 2019, the court (Frank, J.) denied Larkin's motion to vacate the November 2014 order. Larkin now appeals that order.

This Court should affirm. As Supreme Court providently reasoned, Larkin failed to show that he should be relieved of the consequences of his eight-year failure to comply with discovery orders, including a self-executing conditional order. At the time he filed his motion to vacate, Larkin still had not complied with those orders or offered a reasonable excuse for that failure. Nor is there any evidence in the record

that Larkin ever made a good-faith attempt to comply with the orders and obtain the transcripts.

On appeal, Larkin contends that he had a reasonable excuse for failing to comply with the conditional order because the court could not require him to produce transcripts that he did not have. But there is no record of Larkin making that argument to Supreme Court when it issued the order. And even if he did, his disagreement with the order would not provide him with a reasonable excuse for failing to comply once the issue had been resolved against him. In any event, the argument is incorrect, and the conditional order was well within Supreme Court's discretion.

QUESTION PRESENTED

Did Supreme Court providently exercise its discretion in denying Larkin's motion to vacate, where Larkin failed to offer any reasonable excuse for his eight-year failure to comply with the court's discovery orders that would warrant relieving him of the consequences of that failure?

STATEMENT OF THE CASE

In January 2003, Larkin was arrested and charged with criminal sale of a controlled substance and criminal sale of firearms (Record on Appeal ("R") 277-78). Following his arrest, Larkin was the subject of a grand jury trial and three felony trials which resulted, respectively, in a hung jury, a mistrial, and, finally, an acquittal in December 2005 (R12).

After his acquittal, Larkin commenced this action in February 2007, seeking damages for injuries stemming from his arrest and subsequent prosecution (R277-

290). The petition alleged that Larkin suffered psychological damage, including fear and anxiety, as a result of malicious prosecution, false arrest, defamation of character, and civil rights violations by the City and its officers (*id.*). At that time, Larkin also filed an order to show cause to serve a late notice of claim, which Supreme Court (Rakower, J.) granted in March 2007 (R161).

A. Larkin's failure to comply with three discovery orders from July 2011 through April 2014

In September 2010, Supreme Court (Kern, J.) issued the first Case Scheduling Order ("CSO") in the case, which required Larkin "to provide a copy of the criminal court files and certificate of disposition with[in] 45 days" (R176). Following this initial order, Supreme Court issued nine more discovery orders.

As Supreme Court would later explain, the main dispute at the underlying conferences was which party should be required to provide the transcripts of the criminal trials on which Larkin's malicious prosecution claims were based (R6). Apparently, neither party had the full transcripts, and the court ultimately held that the obligation should be Larkin's *(id.*). Indeed, Supreme Court would ultimately issue four orders explicitly ordering Larkin to provide his criminal trial transcripts (R419, 425, 426, 430).

Supreme Court issued its first order in July 2011, directing Larkin to provide the transcripts or swear an affidavit that he did not have them (R418). No such affidavit appears in the record, however, and the court subsequently ordered Larkin to produce the transcripts twice more, in February 2014 and April 2014 (R425, 426).

Although the court once made the scheduling of a deposition contingent on either party's success in obtaining the transcripts beforehand (R421), and another time encouraged both parties to obtain the transcripts (R424), the court never ordered the City to produce them, only Larkin. Indeed, Larkin's December 2012 response to a Notice of Discovery and Inspection confirms that Larkin was on notice that he needed to produce the transcripts. The response stated that he was in the process of obtaining copies but did not provide further detail (R372-75).

To the extent that Larkin objected to Supreme Court's orders, there is no indication in the record that he took protective action to relieve himself of any obligation to comply with them. For example, there is no record of any motion to vacate based on an argument that he could not be required to comply with the orders, nor does Larkin appear to have appealed the orders.

B. The November 2014 conditional order dismissing the complaint and Larkin's four-year failure to file a timely and proper motion to vacate

After Larkin's repeated failures to comply with its orders, Supreme Court (Chan, J.) issued one final discovery order in November 2014 directing him to produce the transcripts within 30 days or have his complaint dismissed (R430). Yet again, Larkin did not comply, and the City followed up with a letter reminding him of the terms of the November 2014 order and requesting, again, that he provide the transcripts (R431). Still, Larkin did not comply. As a result, his complaint was automatically dismissed by operation of the order, and the City then served notice of entry of the order (R437), and an affirmation of non-compliance (R438-39).

Over the next four years, and without ever complying with the discovery orders, Larkin filed two motions seeking to avoid the consequences of the conditional order. But the first was procedurally improper and untimely, and Larkin defaulted on the second.

Larkin's first motion was a motion to reargue the conditional order, which he waited to file until three days *after* the expiration of the 30-day compliance period established by the November 2014 order (R186). Larkin contended that Supreme Court could not require him to pay for the transcripts, and that the burden should fall on the party seeking them—that is, the City (R194). Supreme Court (Chan, J.) rejected the motion in May 2015 on the grounds that Larkin "sought relief that was improper for said motion to reargue" under CPLR 2221 (R195). Supreme Court explained that Larkin in fact sought relief from its prior order automatically dismissing the complaint, and that the correct provision was thus CPLR 5015(a). The court then denied the motion without prejudice so that Larkin could refile under the proper statute (R389).

Larkin nonetheless made no more motions for a year and a half. Instead, in December 2016, over two years after Supreme Court issued the conditional order, he filed a motion to vacate it (R446). In support of his motion to vacate, Larkin argued—apparently for the first time—that he was unable to comply with the Supreme Court's repeated discovery orders because he was not in possession of the requested transcripts (R199). Larkin again argued, as he had in his motion to reargue, that

Supreme Court had erred in requiring him to bear the cost of producing the transcripts (*id.*).

Supreme Court scheduled oral argument on the motion for January 2018 (R393), but Larkin did not appear or provide an explanation for this absence. Argument was rescheduled for March 2018 but was adjourned due to inclement weather (R358). Supreme Court rescheduled oral argument for a third time for April 2018. Once again, Larkin failed to appear, claiming that the date of the hearing had been mis-calendared by his counsel's office (R301). Given Larkin's second failure to appear at oral argument, Supreme Court (Tisch, J.) denied his motion to vacate due to his non-appearance (R395).

C. The Supreme Court's order denying Larkin's motion to vacate the November 14 conditional order and striking his complaint

After Supreme Court rejected his first two attempts to avoid the consequences of his noncompliance with its November 2014 conditional order, Larkin filed another order to show cause in November 2018 (R295). This time, he asked the court to relieve him of the consequences of the April 2018 order denying his motion to vacate and to restore the case to the pretrial calendar so that his motion to vacate the conditional dismissal order could be heard (R296). He argued that he should be relieved from the consequences of the April 2018 order because he had a reasonable excuse for his default and a meritorious defense: that his counsel's office had failed to properly calendar the oral argument (R303).

The City opposed the motion and filed a motion requesting a formal order dismissing the complaint (R356-361; R396-407). The City argued that the conditional order from November 2014 was fully proper, and that the court had discretion to dismiss the complaint given that Larkin had failed to comply with myriad discovery orders over the course of 4 years, and because the November 2014 order put him on notice of the potential dismissal (R359-60, 399-400). Indeed, under established precedent, the court could properly infer from Larkin's conduct that it was willful and contumacious (R401-05). Moreover, in the intervening years, Larkin had ample opportunity to vacate the order via motion but failed to move for vacatur within a reasonable time and then failed, twice, to appear for oral argument (R360, 400-01).

Supreme Court (Frank, J.) granted Larkin's motion to restore the case to the pretrial calendar (R6) but denied Larkin's motion to vacate (R5-7). Because denying the motion to vacate left the 2014 conditional order's dismissal of the complaint intact, the court denied the City's motion to dismiss as moot (*id.*).

Supreme Court reasoned that, while New York state courts prefer to resolve cases on the merits, "where there has been a failure to abide by a court order for over 8 years, and a conditional order was issued and not complied with, dismissal is warranted" (*id.* at 2-3). The court emphasized that Larkin had been provided ample opportunity to have the underlying dispute resolved on the merits but had failed repeatedly to comply with the court's directives (*id.* at 2).

The Order noted that it is undisputed that Supreme Court had determined that the burden for producing the criminal court transcripts was Larkin's to bear (*id.*

at 2). And, while Larkin produced some material that was relevant to the discovery orders, he did not provide the transcripts, instead taking the position at each oral argument that he was not required to do so despite the numerous Court orders (*id.* at 1-2). The November 2014 order gave Larkin one final opportunity to provide the transcripts, and he failed to comply (*id.* at 3). Given that "it was well within the Court's discretion back in 2011 to require [Larkins] to produce the transcripts" (*id.*), and that self-executing conditional orders are deemed absolute upon a party's non-compliance (*id.* at 2), the Court denied Larkin's motion to vacate the November 2014 order and struck the complaint (*id.* at 3).

ARGUMENT

SUPREME COURT PROVIDENTLY DENIED LARKINS' MOTION TO VACATE THE CONDITIONAL ORDER DISMISSING HIS COMPLAINT

Although Larkin characterized his motion as one for relief from an order based on the reversal, modification, or vacatur of a prior order or judgment on which it was based (R446), that motion was not available to him because the November 2014 conditional order had not been reversed, modified, or vacated. *See* CPLR 5015(a)(5); *Long Island Lighting Co. v. Century Indem. Co.*, 52 A.D.3d 383, 384 (1st Dep't 2008). Larkin correctly recognizes on appeal that his motion is properly evaluated according to the standards for a motion seeking relief from a default (Brief of Plaintiff-Appellant ("App. Br.") at 14). *See* CPLR 5015(a)(1); *Anderson & Anderson LLP-Guangzhou v. N. Am. Foreign Trading Corp.*, 165 A.D.3d 511, 512 (1st Dep't 2018) (applying this